No. 85-588

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

THE UNIVERSITY OF TENNESSEE, *et al.*,

Petitioners,

vs.

ROBERT B. ELLIOTT,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENT

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QUESTIONS PRESENTED

1. Wnether issue preclusion should be applied where a state agency did not afford an employee a full and fair opportunity to litigate and failed to decide most of the issues and claims in his federal civil rights action?

2. Whether unreviewed administrative determinations of state agencies should preclude a trial de novo in federal court under Title VII or the Reconstruction Civil Rights Statutes?

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STATEMENT OF THE CASE

This is an action challenging racial discrimination in employment and in the operation of the programs of the University of Tennessee ("the University") and its Institute of Agriculture's Agricultural Extension Service ("AES"). The University, one of the petitioners, is a land grant university that administers AES through its Institute of Agriculture.[1] PA 45. AES utilizes federal funds to

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[1] The following abbreviations are used throughout this brief to cite to the record: "PA" (Appendix to the petition for writ of certiorari); "JA" (Joint Appendix filed with the brief for petitioner); "Pet. Br. A" (Appendix contained in petitioner's brief); "App. 6th Cir. " (the appendix filed with the Sixth Circuit); "Dkt. Nr." (the number assigned to documents filed in the district court and listed in the docket), "Tr." (transcript of the hearing before the administrative agency). Excerpts from the hearing transcript appear in an appendix to this brief (Res. Br. a__).

provide assistance and information to the state's farmers. Id; Tenn. Code Ann. § 49-50-101, 102. It also administers educational programs in agricultural production and marketing, home economics, and community development, as well as 4-H youth programs. PA 48.

The respondent, Robert B. Elliottt, is a black male employed by AES, and therefore the University, as an Agricultural Extension Agent. PA 37, 45.

The Charge Letter

In December, 1981, respondent received a letter from his immediate supervisor proposing to terminate his employment. JA 21. The letter advised respondent that he could request a hearing to contest charges of inadequate job performance and improper behavior, and

that a failure to request a hearing within five days would result in the termination of his employment. JA 21-22.

Under the University's procedures, respondent could contest the charges by way of either the University's informal, internal hearing procedure, or he could request a hearing under the contested case provisions of the Tennessee Uniform Administrative Procedures Act. Id. Respondent chose the latter means of protesting his proposed termination.

Respondent's Federal Action

Prior to the commencement of administrative proceedings and believing that the actions being taken against him were part of a pattern and practice of racial discrimination by his employer, respondent initiated this action by filing a complaint in the Western District of Tennesssee, on January 14, 1982.

A. The Complaint Allegations

Respondent's complaint alleged that the University, AES and the other named defendants were engaged in a substantial number of unlawful actions that fell into three distinct categories: classwide racially discriminatory practices, actions taken in retaliation against respondent because of his civil rights activities, and actions specifically directed against respondent because of his race. Respondent alleged that the defendants' actions violated the First, Thirteenth, and Fourteenth Amendments to the United States Constitution, as well as 42 U.S.C. §§ 1981, 1983, 1985, 1986, and 2000d and e ("Title VII").

(1) Class Claims. Many of the alleged classwide discriminatory practices were of the sort which, if present, would have had an immediate and direct adverse

impact on respondent. Respondent asserted, for example, that it was the general practice of petitioners to discriminate against black employees in compensation, assignments, promotion and training. JA 7, 10, 11. Respondent also contended that petitioners deliberately and systematically operated AES programs in a manner that discriminated against and segregated black members of the public; respondent objected that, as an AES employee, he was thus required to participate in unconstitutional and illegal action. JA 7, 8, 10. The complaint also alleged the existence of other discriminatory practices, such as intentional discrimination in the selection of the supervisory officials to whom respondent was subordinate. JA 10, 11.

(2) **Retaliation Claims.** The complaint alleged that a number of specific actions had been taken against respondent in retaliation for his civil rights activities, retaliation that respondent asserted violated both the First and Fourteenth Amendments. The complaint spelled out those civil rights activities in detail, noting several instances in which respondent had formally complained about racial discrimination within AES itself. JA 11-12. Respondent set forth a number of specific actions that he claimed were taken for retaliatory purposes, including harassment, false allegations of improper or inadequate behavior, and the attempt to bring about his dismissal. JA 7, 14, 15. Respondent attributed these actions to two different conspiracies among the defendants: one precipitated by his action in objecting to the use of the

phrase "nigger" by an official at an extension service fair, and one involving efforts by the white members of the Madison County Agricultural extension Service Committee to persuade AES to fire respondent. JA 12-14.

(3) **Individual Employment Claims.** Third, the complaint alleged that on a number of occasions adverse personnel actions had been taken against respondent because of his race. The actions attributed to such a specific racial motive included reassignments, harassment, the filing of false charges of incompetence or misbehavior, and the commencement of dismissal proceedings. JA 7, 11, 14, 15.

B. The Defendants Named in Complaint

The complaint named fourteen distinct defendants, whose identity is important to an understanding of the scope of the administrative decision. Two of the

defendants are state agencies, the University and AES, and five of the defendants are employees of those agencies -- Edward Boling, Willis W. Armistead, M. Lloyd Downen, Haywood Luck and Curtis Shearon. Also named as defendants were five individuals who were not AES employees, but who served as members of the Madison County Agricultural Extension Service Committee -- Billy Donnell, Arthur Johnson, Mrs. Neil Smith, Jimmy Hopper and Mrs. Robert Cathey. Respondent worked in Madison County, and it was these individuals who were alleged to have initiated the action seeking respondent's dismissal. Finally, the complaint named as defendants Murray Truck Lines, Inc., a company operating in Madison County, and its manager Tom Korwin,as well as Tommy Coley.

It was actions taken by these two individuals that allegedly prompted the retaliation described above. JA 5-6.

C. **Relief Sought in The Complaint**

Respondent sought preliminary and permanent injunctive relief, for himself individually and for members of a class sought to be certified, as well as individual and class-wide monetary damages. The complaint also sought a temporary restraining order to prevent the University from taking any adverse employment action against respondent. JA 17-18.

D. **District Court's Orders Denying Injunctive Relief**

The district court issued a temporary restraining order, pending an answer to the complaint and an opportunity for the

court to hold a limited hearing during the month of February. Order, Jan. 19, 1982, Dkt. Nr. 4.

The University moved to dissolve the restraining order, arguing, inter alia, that the action was not ripe for judicial review because respondent had not yet been dismissed from his employment and that "judicial review should be postponed" until the conclusion of the administrative hearing. The court thereupon withdrew the restraining order "without in any fashion, adjudicating the merits of this controversy," based on the pendency of the hearing. Order, Feb. 23, 1982, Dkt. Nr.

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[2] App. 6th Cir. pp. 38-39. The University also argued that respondent had not met the prerequisites for injunctive relief and that the court did not have jurisdiction over certain defendants and did not have jurisdiction to hear the Title VII claims because no right-to-sue leter had been issued. App. 6th Cir. 48-52. A right-to-sue letter was issued November 19, 1982.

12 (App. 6th Cir. p. 165). One month later, The district court declined to grant any preliminary relief, finding that while affidavits filed with the court indicated "sharp conflict with regard to the issues in this case on the merits," respondent had not shown irreparable harm and that any relief must await a "hearing and trial on the merits." Order, Mar. 29, 1982, Dkt. Nr. 14 (App. 6th Cir. p. 167).

The Administrative Proceedings

Shortly thereafter the administrative proceedings began. Respondent's administrative hearing was governed by the contested case provisions of the Tennessee Uniform Administrative Procedures Act ("UAPA"), Tenn. Code Ann. §§ 4-5-301, et seq. (Pet. Br. A6-36). Under those provisions, the hearing may be conducted by a requisite number of members of the agency involved, as well as an adminis-

trative judge or hearing officer. Alternatively, the hearing may be conducted by an administrative judge or hearing officer sitting alone. Tenn. Code Ann. § 4-5-301(b) (Br. App. A7). The statute provides for discovery, the filing of briefs, and for the admission of evidence in parity with the civil rules of evidence.[3] There is no de novo review of claims presented during the hearing, rather, review of the agency's final decision is limited to a review of the record to determine whether substantial evidence exists to support the decision. Tenn. Code Ann. § 4-5-322(h) (Pet. Br. A32-35).

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[3] Tenn. Code Ann. §§ 4-5-308, 4-5-311, § 4-5-313(1) (Pet. Br. A14, 17-22). The statute permits the agency to rely on evidence not otherwise admissible if it is ... "of a type commonly relied on by reasonably prudent men in the conduct of their affairs." Id.

A. **The Hearing**

(1) **The Hearing Examiner**. Respondent's administrative hearing was conducted by a hearing examiner sitting alone, between April and October 1982. Ignoring respondent's request that the hearing be conducted by someone entirely unconnected with either the University or AES,[4] the University's Vice-President for Agriculture, W.W. Armistead,one of the individuals named as a defendant in the federal court litigation, assigned his Assistant Vice-President for Agriculture, B. H. Pentecost,[5] to hear the case. P.A. 182; Tr. I, 3.

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[4] See App. 6th Cir. p.63 (letter dated January 5, 1982, attached as exhibit B to initial Motion to Dismiss, Dkt. Nr. 6).

[5] The statute provides for cases to be heard by one employed by the Secretary of State, upon agency request. Tenn. Code Ann. § 4-5-301(d)

(2) **The Participants**. Two parties participated in the hearing: respondent and the University. Both were represented by counsel. None of the other parties named as defendants in the complaint particpated, except that some of these persons appeared as witnesses for the University. None of the non-University defendants was represented or participated in the examination of witnesses.[6]

(3) **The Charges**. The University claimed that respondent's dismissal was justified by ten charges. These charges ranged from insubordination to playing golf and conducting personal business on working hours.[7]

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6 See, generally, hearing transcript.

7 The specific charges, as outlined in the hearing examiner's opinion, included the following: (1) playing golf during working hours on one occasion in 1976, one occasion in 1981 and on one occasion in 1982; (2) engaging in non-University business during working hours on several occasions in 1980; (3) making or allowing to be made harassing telephone calls to a private citizen; (4) improper job behavior in the use of abusive language and trespassing on one occasion; (5) improper job behavior in the use, on one occasion, of profane language" in public; (6) certain instances of leaving work prior to the end of a work day; (7) charging long-distance telephone calls to the University; (8) being insubordinate, and thereby violating a University work rule, by failing to complete certain work assignments; (9) failing to complete assignments, thereby performing his job inadequately; and (10) violation of a University work rule by the use of profane language on two occasions PA 39-43.

B. The Scope of the Hearing

At the outset of the hearing respondent sought to file a statement of "counter-issues" asserting that the charges had been filed "because of racial prejudice ... and/or because of his complaints against racial discrimination..."[8] Petitioners promptly and

8 PA 43-44.

successfully objected to this proposed statement:

> We would respectfully submit ... that the statement of counter-issues are completely improper, and we would point out to the Hearing Examiner that a civil proceeding ... is presently under way, in the United States District Court ... wherein the Employee ... has sued the University Agricultural Extension Service and many of the University officials for the exact charges that have been raised in the counter-charges by counsel at this time; and that those issues are not before this proceeding, but are in fact before the Federal Court in another matter.[9]

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[9] Transcript of Administrative Hearing volume i, pp. 33-34 (Res. Br. a1-2) (hereinafter cited as Tr.). In its Proposed Findings of Fact and Conclusions of Law submitted in the administrative hearing, the University urged:

> [T]here is no jurisdiction in this ... case to try counter charges of the employee that the University's proposed action violates 42 U.S.C. §§ 1981, 1982, 1983, 1985 or 1986.... [N]o jurisdiction exists in this forum to try a race discrimination case under Title VII.... [I]f jurisdiction exists over these civil rights actions, it exists in the federal district court and not in this administrative hearing.

pp. 4-5.

The hearing examiner sustained that objection, holding that the administrative proceeding was "not a proper forum to hear these particular issues",[10] and expressly basing that decision on "the understanding that these counter issues will be afforded ample opportunity [for a hearing] in a proper Court."[11]

Counsel for the University continued throughout the administrative hearing to assert that the discrimination issues belonged in federal court alone, stating that it was improper

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[10] Id. at 40.

[11] Id. at 36-37.

> to have to try a Title VII discrimination lawsuit here at this forum, and there is no jurisdiction in this forum for such a case.... I will continue to object to all efforts to try ... a Federal lawsuit here, in this hearing.[12]

The hearing examiner reiterated with equal consistency his understanding that the discrimination issues could and would be resolved in the federal action:

> I cannot, by the authority granted me under this Administrative Procedure Act, make determinations relative to discrimination... I believe that you are going to have your day in court, as I stated earlier in this hearing, there is another forum for certain aspects of the racial issues, and I absolutely have no authority to rule on them.[13]

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[12] Tr. xix, p. 129. See also Tr. xxiii, p. 92 ("There has been an Employment Equal Opportunity Commission [sic] charge filed, by Mr. Elliott, against the Agricultural Extension Service for alleged racial discrimination in the Madison County Office. This is not the place to try that or to investigate it.")

[13] Tr. v. xxiii, p. 97.

The hearing examiner made clear he would consider, at most, only the claim that the university officials had acted for discriminatory purposes when they filed the particular charges at issue in the administrative proceeding.

C. Excluded Evidence

Throughout the administrative proceeding counsel for the University consistently and with almost complete success objected to evidence of discrimination on the ground that it belonged only in the federal action, and had no relevance to the issues in that administrative action.

Respondent repeatedly, sought to introduce evidence that AES had never disciplined whites for the sort of minor infractions with which he was charged; counsel for the university successfully objected to that evidence on the ground

that discrimination in discipline was a matter which only the federal court could consider:

> We are here to find if the charge [against respondent] is to be sustained or not. This is not a Title VII race discrimination case. The kind of testimony that is asked to be elicited ... relates to that and would relate in that case and the jurisdiction of that case is the United States District Court ... and this hearing has no jurisdiction over those matters.... And also there is an EEOC complaint, and the EEOC will investigate this. For it to be brought out here and no is wrong. It's wrong because it's irrelevant and it's immaterial. This administrative proceedings [sic] doesn't have jurisdiction over those matters.[14]

The hearing examiner consistently excluded evidence that whites had not been dis-

[14] Tr. xxvii, pp. 27-28. Other instances in which the University successfully objected to evidence of racial discrimination in discipline are to be found at i, pp. 149, 152-53; ix, pp. 111-125; ix, pp. 132, 136-37; xi, pp. 29, 33-34; xii, p. 156; xiii, pp. 12-14; xvi, p. 32 (Res. Br. a4-6; 9-19).

ciplined for conduct similar to that with which respondent was charged, explaining "You have another forum, I believe that you are already in court, to bring this ..."[15]

Other evidence was excluded for the same reason. When respondent sought to prove that his work assignments had been changed because of a policy of segregating 4-H Clubs, and of assigning only white employees to clubs with white members, the university objected that such evidence "doesn't have anything to do with the charges in this case. It may have something to do with [respondent's] lawsuit, which he has brought, his class action against the Extension Service."[16]

[15] Tr. ii, p. 152.

[16] Tr. xxiii, p. 30. Similar successful objections to evidence regarding discrimination in the operation of the 4-H clubs can be found at Tr. xxix, p. 26 ("[T]here's other proceedings already

The hearing examiner repeatedly refused to consider such evidence regarding discrimination in the operation or staffing of 4-H clubs, explaining "I am not getting further into the issue which I know is going to come before a Federal Judge, who is competent and has the authority to listen to his ..."[17] When respondent sought to introduce an EEOC study of employment practices within the Extension Service,

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under way for that to be investigated."), 107 ("I object to going further in the matter of complaints about the 4-H Club. It is a different matter and a different lawsuit and different place."); xxxiiii, p. 133 ("This isn't the place. We have a lawsuit in which those issues are present."); xliv, pp. 23-26 ("It's irrelevant to this proceeding. There's another proceeding that it'd be relevant to ... The case that's in Federal Court, I don't think we should go into here... The point is, Mr. Hearing examiner, that well, very well, may be an issue regarding this class action, that has been brought against the university. But this is not the place to try this class action.").

[17] Tr. xxix, p. 109.

the University objected that such evidence related only to the "Title VII lawsuit that has been filed [against the Defendants]... in Federal Court"[18] and the hearing examiner held that the evidence was irrelevant in light of his decision the first day of the hearing that the respondent could not litigate his federal discrimination claims in the administrative proceeding.[19] When counsel for respondent sought to ask questions about disparities in the salaries of black and white employees, counsel for the University objected that a complaint about salary discrimination should be raised with "the proper authorities... This is not the place to look at it."[20] and the

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[18] Tr. xix, p. 124.

[19] Tr. xix, p. 128.

[20] Tr. xxxiii, p. 4.

hearing examiner held that "[t]his is not ... the proper forum for this to be asked."[21]

Excluded summary manner was evidence of obvious relevance to respondent's federal claims, such as proof of racial discrimination in promotions[22] and evidence that retaliatory action may have been taken against respondent because of his civil rights activities.[23]

Throughout the trial the University continued to successfully object on this ground to evidence of discrimination,

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[21] Id.

[22] Tr. xix, pp. 144-45.

[23] Tr. i, p. 76, v. iii, p. 422. See also Tr. xxvi, pp. 153-55 (excluding evidence of statewide discriminatory practices); xxviii, p. 210 (excluding evidence regarding what types of discrimination might have been apparent in respondent's office); xlv, pp. 33-34 (excluding evidence regarding discrimination in the selection of county committee members.)

which it insisted was only relevant to the federal claims. When respondent sought to prove the existence of discrimination in the operation of AES programs, the University argued that such evidence should be considered only in the "civil rights action brought by the employee in the United States District Court ... since the employee, by his own choice, has chosen that forum in which to bring a[n] action of racial discrimination."[24] Respondent attempted to adduce evidence that during extension service meetings blacks were referred to by their first names, while whites were referred to as M. nd Mrs.; the University successfully objected on the ground that "this is not the place to try the race discrimination

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[24] Tr. iv, p. 484. See also id. at 486 ("[T]he case against the University in Federal Court, should not be tried through this witness here.")

case against the Agricultural Extension Service."[25] Similarly, counsel for the University prevented respondent from asking questions about racial discrimination in employee ratings, arguing "You can go into that in the Federal Court case if it's part of the pattern o[r] practice, but it doesn't relate here."[26] Efforts to show that respondent's immediate supervisor had a practice of giving gifts to white but not black workers was also thwarted, the University contending that "[i]t doesn't relate to these proceedings" although"[i]t may relate to some claim of race discrimination that is a Title VII case pending in Federal Court...."[27] The hearing examiner sustained a similar

[25] Tr. xxxiii, p. 227.

[26] Tr. xliv, p. 36.

[27] Tr. xxii, p. 16.

objection to evidence designed to show that the low income farmers to whom respondent had been assigned were predominantly black.[28]

During the administrative proceeding the university successfully argued that the hearing examiner should disregard evidence regarding the motives of any of the seven federal defendants who were not extension service employees, arguing that the motives of such non-employees was

> irrelevant and not material and not pertinent to this hearing. Plus there is a lawsuit that is separate from this in which those matters may be pertinent and it is not proper for us to go in here what is in that other lawsuit.[29]

[28] Tr. xix, p. 147 ("It is not relevant to this proceeding... This isn't the place to try such a case as the overall.")

[29] Tr. xxiv, p. 178. In its Proposed Findings of Fact and Conclusions of Law in the administrative proceeding the University urged that the hearing examiner's responsibility was not to "determine whether Madison County acted properly in its recommendation [that Elliott be dismissed], but to determine the propriety of

The hearing examiner agreed, explaining "I do not have the authority, as I perceive it, to try or to make rulings relating to racial discrimination in this administrative hearing."[30]

The Administrative Decision

A. The Charges

In a decision issued on April 4, 1983, the hearing examiner found that only three of the ten charges brought by the University were supported by the evidence, and he concluded that they did not justify respondent's termination.[31] Nevertheless,

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[30] Tr. xxiv, p. 176; see also Tr. xxiii, pp. 129, 131.

[31] PA 178. Specifically, the hearing examiner found support for the University's contention that (1) respondent had played golf on one occasion in 1981 during work hours, but that even if he had played golf in earlier years any charges relating to those earlier instances would be stale; (2) that although respondent reimbursed the University, he made long distance personal calls from the office in violation of the University rule, and (3) that the employee was guilty of using

the hearing examiner was of the view that a deteriorating personal relationship between his supervisor and him required respondent's reassignment. PA 180. Despite the exclusic of relevant evidence, the hearing examiner also concluded that "the employee has failed in his defense ... that the charges against him were a pretext or cover up for racial discrimination...." P.A. 178.

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personal calls from the office in violation of the University rule, and (3) that the employee was guilty of using profane languae in public on one occasion. However, the hearing examiner found that the University had failed to prove that Elliott engaged in personal business during working hours or that he was insubordinate or guilty of inadequate work performance. The hearing examiner declined to rule on one of the charges. PA 178.

B. The Scope of the Hearing

The hearing examiner's decision made clear that he accepted the University's position that he did not have the jurisdiction to consider claims of racial discrimination:

> However, it is the hearing examiner's opinion that this was not the appropriate forum and that he has no jurisdiction under the UAPA contested case provisions, supra to try civil rights actions on the merits as proposed in employee's counter charges. If an action lies, it lies not in state proceedings such as this hearing. Such an action has been filed by employee in United States District Court in Jackson, Tennessee, Robert B. Elliott v. The University of Tennessee, et al. (C.A. No. 82-1014, W.D. Tenn. E. Div.) therefore, this hearing examiner concludes that if jurisdiction exists over the counter issues raised by employee, it exists in that Federal District Court and that employee may not try his civil rights action in this forum.

PA 44-45.

The Final Agency Decision

The hearing examiner's order was appealed to the University. That appeal was heard by Mr. Armistead,[32] who affirmed the initial order in a two-page letter that indicated he concurred with the conclusions and that the order was thereby adopted as the agency decision. PA 33-35. The final order was not appealed to state court by either petitioner or respondent.

Respondent's Return To Federal Court

Instead, respondent filed a motion for a TRO and stay of the agency order pending a hearing in court. Dkt Nr. 26 (6th Cir. App. 169).

The motion asserted several new claims which had not been set forth in the original complaint. The motion and accompanying memorandum alleged that the

[32] See supra p. 13.

defendants had adopted a number of new practices which not only were discriminatory in purpose but which also violated the order issued by the hearing examiner. These practices included placing on respondent burdens different and greater than those imposed on whites, establishing evaluation criteria calculated to facilitate yet another effort to dismiss respondent, and a failure to establish clear and objective job responsibilities for respondent. The motion and memorandum also directly attacked as unconstitutional the action of the hearing examiner to order respondent's transfer to another county; respondent complained, inter alia, that the hearing examiner was biased and that the transfer constituted double punishment for alleged misconduct for which he had already been sanctioned years

earlier.[33] The University opposed this motion and filed a motion for summary judgment, asserting, inter alia, that the district court lacked jurisdiction to review the agency findings that could be reviewed only by a state court. For the first time, and totally contrary to the position taken before the hearing examiner, the University argued that the final agency decision was res judicata as to all claims raised in the complaint.[34] Respondent sought an extension of time in which to respond to this motion, so that

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[33] Motion for a Temporary Restraining Order and/or a Temporary Stay, October 24, 1983; Memorandum in Support of Plaintiff's Motion for a Temporary Restraining Order and/or a Temporary Stay, October 24, 1983. App. 6th Cir. pp. 169-175; 294-303.

[34] Response of the University of Tennessee Defendants to Plaintiff's Motion for TRO, November 3, 1983. App. 6th Cir. pp. 311-320.

he could obtain a transcript of the administrative hearing.[35]

The district court, without and having before it the administrative record and despite the lack of any findings regarding non-University defendants in the administrative decision, granted the motion for summary judgment and dismissed the action as to all defendants. Respondent filed a motion pursuant to Rule 59(e), Fed. R. Civ. P., and he amended that motion, to file a copy of the hearing transcript.[36] The University sought to prevent the district court from examining the transcript by moving that the transcript be stricken from the record; the district court declined to grant that motion. Dkt Nr. 52, 54. The Rule 59

[35] Dkt Nr. 32.

[36] App. 6th Cir. p. 380; see, entry following Dkt Nr. 51.

motions were denied, and respondent appealed the district court's grant of summary judgment.

Appeal to the Sixth Circuit

The Court of Appeals reversed the judgment of the district court. Relying on this Court's decision in Kremer v. Chemical Construction Co., 456 U.S. 461 (1982), it held that respondent's Title VII claims were not barred by res judicata, because there had been no state court review or judgment. PA 11-13.

The Court or Appeals further held that the district court had also erred in dismissing the claims asserted under 42 U.S.C. § 1981, 1983, 1985, 1986 and 1988. PA 13. The Court first looked to the principles announced in Allen v. McCurry, 449 U.S. 90 (1980) and Migra v. Warren City School District Board of Education, 465 U.S. 75 (1984) and found that Section

1738 (28 U.S.C. § 1738) did not require federal courts to defer to unreviewed agency findings. PA 15-16. Finally, its analysis of common law preclusion principles led the Court to hold that according preclusive effect to unreviewed state agency determinations would deprive a plaintiff of a federal remedy. PA 20-22.

SUMMARY OF ARGUMENT

Petitioners seek issue preclusion on an issue, i.e., racial discrimination in employment, that has not been "litigated and decided." Migra v. Warren City School District, 464 U.S. 75 (1984). Respondent has not had "a full and fair opportunity" to litigate this issue. Allen v. McCurry, 449 U.S.90 (1980). The hearing examiner, an employee of the University petitioner, restricted testimony and excluded evidence concerning discrimination by the University and its agents.

Issue preclusion is simply not applicable to most of the claims in respondent's federal complaint since there has been no decision on those issues.

Traditional principles, as embodied in 28 U.S.C. § 1738, are not applicable to the instant case since that statute, by its terms, only applies to the decisions of "courts" and the agency here does not qualify as a court.

Even if § 1738 generally could be interpreted to apply to administrative agencies, there is "an express or implied partial repeal" of the statute with respect to prior agency decisions when a plaintiff asserts a cause of action under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e et seq. Kremer v. Chemical Construction Corp., 456 U.S. 461, 468 (1982). The legislative history of

that Act makes clear that this repeal exists whether or not the agency is part of the statutory scheme of Title VII.

This Court has indicated that resort to administrative agencies will not prevent an individual from asserting rights under 42 U.S.C. § 1983. See, e.g., Patsy v. Florida Board of Regents, 457 U.S. 496 (1982); Fair Assessment in Real Estate v. McNary, 454 U.S. 100 (1981).

Whether this case is evaluated on its particular facts or on express and implied limitations on the doctrines of preclusion, the decision of the court of appeals should be affirmed.

ARGUMENT

THE PARTICULAR AGENCY DECISION IN THIS CASE IS NOT ENTITLED TO PRECLUSION UNDER TRADITIONAL PRINCIPLES

Petitioners seek issue preclusion, or collateral estoppel, on the "issue of racial discrimination" and ask this Court to apply traditional principles of full faith and credit to achieve that end. Pet. Br. 26-27.[37] Petitioners begin their analysis by asserting conclusorily that this issue was fully litigated. Pet.Br. at 20.[38] Respondent does not agree that the Court should apply traditional principles

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[37] Petitioners acknowledge that claim preclusion or res judicata is not available since the hearing examiner lacked jurisdiction. Id. at n.11.

[38] As discussed below, different principles apply when the prior determination has been made by an agency and when the subsequent proceeding is a federal action under Title VII, 42 U.S.C. § 2000e et seq or one of the 1871 Civil Rights statutes 42 U.S.C. §§ 1981, 1983, 1985, 1986, 1988.

of preclusion, but submit that, if such principles were applicable, the analysis should begin by examining, in fact, what was litigated and decided in the agency and how fully those issues and claims were presented to and considered by that agency. This analysis shows that traditional principles mandate that preclusion should not apply to this case. It is a well-settled principle that

> [C]ollateral estoppel cannot apply when the party against whom the earlier decision is asserted did not have a 'full and fair opportunity' to litigate that issue in the earlier case. Montana v. United States, [440 U.S. 147, 153 (1979)], Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation, [402 U.S. 313, 328-329 (1971)].

Allen v. McCurry, 449 U.S. 90, 95 (1980). Moreover, it applies only to matters that have been both "litigated and decided". Migra v. Warren City School District, 465 U.S. 75,77 n.1 (1984). While the petitioners would like the Court to accept their assurance that the issue of racial discrimination was fully litigated, they fail to even confront the second element. Nowhere in petitioners' brief will the Court find an assertion that the issues raised by respondent's federal complaint were actually decided by the hearing examiner. Instead, petitioners assert, in a carefully chosen phrase repeated some 20 times in their brief, only that the issues in the federal complaint were "fully and fairly litigated" in the administrative proceeding.[39] (Emphasis added). If an issue were only litigated in, but never actually

[39] Pet. Br. i, iii, 12, 13, 15, 16, 20, 27, 31, 37, 38, 39, 41. Consistent with this carefully chosen language, the questions presented proposed by petitioners concern whether full faith and credit apply to "issues fully and fairly litigated before a state agency" not whether full faith and credit apply to issues litigated before and decided by a state agency.

resolved by, the administrative process, then issue preclusion would of course be improper; there can be no collateral estoppel if the matter in question was never actually adjudicated.

This striking omission is far from inadvertent. In the district court[40] and in the court of appeals[41] respondent repeatedly and expressly asserted that the hearing examiner had refused to decide the issues presented in his federal complaint. Although petitioners themselves appear to understand that issue preclusion is inappropriate for issues that were not actually adjudicated,[42] petitioners in the

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[40] Plaintiff's Memorandum in Support of Motion for TRO, p. 21; Plaintiff's Response to Defendant's Amended Motion for Summary Judgment, p. 3; Memorandum in Support of Plaintiff's Motion for New Trial, pp. 1, 2, 4.

[41] Brief for Appellant, p. 2.

[42] Pet. Br. 35, 38, 42.

court of appeals, as here, carefully and consistently declined to assert that the hearing examiner had in fact decided all or most of the questions raised by the federal complaint.[43]

As we set out in detail below, there are two distinct reasons for the apparently curious phrasing of petitioners' brief. First, the respondent was prevented from having a full and fair opportunity to litigate. Second, the hearing examiner in the administrative proceeding clearly did not decide almost any of the issues raised by the federal

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[43] Brief for Defendants-Appellees, pp. 6 (plaintiff "raised" his discrimination claims in the administrative hearing), 17 (discrimination issues "litigated" in administrative hearing), 18 (plaintiff "raised" his claims in the administrative hearing), 19 (discrimination claims "litigated" in the administrative process).

complaint; on the contrary, the examiner was quite explicit in refusing to decide those issues.[44]

A. Opportunity to Litigate

Throughout the administrative hearing counsel for petitioners repeatedly and successfully argued that only the federal court should decide the discrimination issues, and that the hearing examiner for that reason should not admit evidence regarding or undertake to resolve those issues. Although petitioners in this Court insist that respondent was entitled to litigate his discrimination claims in the administrative hearing, petitioners

[44] The district court opinion on which petitioners rely did not hold or suggest that the issues raised by the federal complaint had actually been decided in the administrative hearing. Rather, the district court observed only that discrimination issues had been "litigated in the UAPA proceeding". PA 32.

successfully argued precisely the opposite when they were before the hearing examiner. Under these circumstances the application of issue preclusion is clearly inappropriate.[45]

Many of the issues raised by respondent's federal claims were "litigated" in the administrative hearing only in the sense that, despite the hearing examiner's repeatedly expressed refusal to admit or consider most evidence of discrimination, respondent's counsel persisted in making systematic and generally unsuccessful

[45] Issue preclusion is not appropriate "because the party sought to be precluded, as a result of the conduct of his adversary ... did not have an adequate opportunity ... to obtain a full and fair adjudication in the initial action. Restatement (Second) of Judgment (1980 § 28(5). Having acted to deprive Mr. Elliott of a full and fair opportunity to litigate the issue of discrimination, the University should not be permitted to rely on the preclusive effect of the agency determination.

offers of proof. Petitioners' assertion with regard to the administrative hearing that the discrimination issues "hardly could have been litigated more fully" (Pet. Br. 20) is somewhat difficult to reconcile with what actually occurred in that proceeding.

The petitioners claim of issue preclusion is based merely on two circumstances: (1) The length of the administrative proceeding and (2) the Administrative Law Judge's assertion that he addressed the issue of "racial discrimination." Neither of these circumstances are analytically supportive of preclusion. The length of the proceeding might be of some relevance if the issue before the hearing examiner was racial discrimination in employment. Here, however, the focus of the hearing and of the examiner was the work performance and job behavior of

respondent.[46] Almost of the testimony was directed toward these issues and respondent defended himself specifically against charges in this area.[47] The petitioners would like to give the impression that the extent of the record herein conclusively shows that respondent had a full and fair opportunity to litigate the issue of racial discrimination. Pet. Br. 29-21. This simply ignores the fact that very little of the testimony or the hearing

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46 "The purpose of this hearing was to determine whether or not the employment of Madison County Associate Agricultural Extension Agent, Robert B. Elliott ... should be terminated for alleged inadequate work performance and inadequate and/or improper job behavior." PA 37.

47 "Employee produced some 90 witnesses who testified relative to the services he had performed for small farmers and others in Madison County from time he first came to the county up to and including the date of their testimony during the hearing." PA 114.

examiner's order even addressed the question of racial discrimination.[48]

More importantly, the hearing examiner agreed with the petitioners that he had no jurisdiction over the issue of racial discrimination and that a proceeding under the UAPA contested cases provisions was an improper forum to raise such issues. PA 44. It was this view which led him to restrict testimony and exclude evidence of racial discrimination.

A full and fair opportunity to litigate embodies two components: procedural fairness and substantive adequacy. The hearing conducted by the agency here falls short in both areas. The petitioners attempt to avoid these deficien-

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[48] For example, while the Initial Order comprises almost 150 pages in the appendix, fewer than seven pages (PA 171-177) comprise the hearing examiner's views on the racial discrimination issue.

cies by reference to the outer trimmings of the hearing, knowing full well that the actual conduct of the hearing belies their assertion. For example, the petitioners point out the trial-type rights provided by the UAPA, but fail to bring to this Court's attention (1) the University's repeated <u>successful</u> attempts to restrict evidence on racial discrimination during the hearing and (2) its subsequent attempts to keep the hearing transcript (and thus the inadequacy of the hearing on the issue of discrimination) from the district court. The UAPA may have provided procedural rights but the University succeeded in preventing those theoretical rights from being translated into a full and fair opportunity to litigate.

B. **The Decision of the Hearing Examiner**

The actual decision of the hearing examiner generally adhered to the view successfully advanced by the university during the hearing itself regarding the irrelevance of discrimination issues. The hearing examiner expressly refused to decide discrimination issues "unrelated to the proposed termination of Elliott", explaining that he did not have "jurisdiction in this proceeding to try a civil rights case on the merits" and that the "proper forum" for such claims was "the federal court in which Elliott has filed his federal lawsuit." (PA 171). The only discrimination issue which the examiner did deem relevant to the administrative proceeding was whether "the employer's action in bringing charges against the employee ... were based on ... racial discrimination." (PA 177).

The examiner's decision circumspectly avoids deciding, or even addressing, almost all the discrimination and retaliation issues raised by respondent's federal complaint. First, the examiner expressly refused to issue any ruling regarding actions or motives of the seven federal defendants who were not AES employees, noting that such matters were "outside the parameters of this hearing." (PA 174). Second the examiner's opinion is devoid of any reference to respondent's allegations that the extension service engaged in systematic discriminatory practices, such as servicewide discrimination in hiring, compensation, assignments, promotions, training, appointment of supervisors, or program administration. Third, the examiner's opinion, with one narrow exception,[49] contains no discussion

[49] The hearing examiner concluded that

whatever of respondent's claims that extension service officials had retaliated against him because of his civil rights activities; indeed, the opinion does not expressly address the issue of whether the charges filed against respondent had been the result of retaliation, as distinguished from racial prejudice. Fourth, the examiner's opinion does not, of course, address any of petitioner's subsequent claims that the defendants engaged in new discriminatory practices after the issuance of that opinion.

The one issue that the hearing examiner's opinion does attempt to address is whether AES officials actually believed

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Shearon's order prohibiting Elliott from visiting golf courses during working hours was not issued in retaliation for Elliott's efforts to integrate all-white golf courses. (PA 172). The examiner's opinion does not address the question of whether other actions by Elliott's supervisors might have been so motivated.

respondent had violated the service's rules and standards, or had knowingly filed false charges for racial reasons. The hearing examiner concluded that the extension service defendants acted on the basis of what they "perceived as improper and/or inadequate behavior." (PA 177). The federal complaint alleged, however, that the proposal to dismiss respondent was initiated, not by AES employees, but by the white members of the Madison County Agricultural Extension Service Committee, allegedly in collusion with the private defendants Korwin and Murray Truck Lines. Thus the hearing examiner's opinion is not dispositive of the federal claim that the dismissal action was tainted by a discriminatory purpose, but merely exonerates some but not all of the federal defendants of one aspect of that charge.

Although the hearing examiner repeatedly states that he cannot resolve any discrimination issue other than whether there was a racial purpose behind the University's charges, the examiner's opinion inexplicably contains several pages discussing allegations of discrimination in incidents that were not the subject of those charges (PA 172-77). This apparent inconsistency has a simple explanation. Following the conclusion of the administrative hearing, the University submitted Proposed Findings of Fact and Conclusions of Law which asserted that the examiner had no jurisdiction over discrimination claims regarding incidents other than those leading to the particular charges against respondent. The University, however, also included in that pleading proposed findings regarding a dozen incidents, most of which were not

the subject of the pending charges, although expressly noting with regard to at least one of them that the claim was "unrelated to the disciplinary charges in this case."[50] The portions of the hearing examiner's opinion dealing with such unrelated incidents are taken directly from the university's proposed findings; the hearing examiner discusses exactly the same issues, in virtually the same order, often using language or sentences lifted verbatim from the university's draft.[51]

This portion of the hearing examiner's opinion raises several issues that were not addressed below. First, if, as both the examiner and the university at times maintained, resolution of these separate discrimination claims was

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[50] Proposed Findings of Fact and Conclusions of Law, p. 79.

[51] Compare, id. at 70-79 with PA 172-77.

irrelevant to the charges actually before the examiner, then any adjudication of those claims would be gratuitous and not binding in a subsequent proceeding. Second, in a number of instances the opinion recites there is "no evidence" of discrimination as to a claim which the examiner had dismissed as irrelevant during the hearing itself, and regarding which the examiner had thus refused to admit evidence.[52] Clearly, respondent did not have a full and fair opportunity to litigate such issues. Third, it is clear that the legal standards applied by the hearing examiner in rejecting what he characterized as respondent's "affirmative defense" were not the same as the standards that would be applied in a Title VII

[52] Compare PA 173 (no evidence of salary discrimination) with Tr. xxxiii p.3 (evidence of salary discrimination excluded as irrelevant).

or Section 1983 case. If the administrative preclusion were to be accorded effect in a Title VII or Section 1983 action, the lower courts would have to determine on remand whether the narrow issues that were actually resolved by the hearing examiner should be given such an effect in light of the peculiar history of the administrative proceeding.

C. **The Tennessee UAPA Process**

The concepts of res judicata and collateral estoppel rest on notions of finality, that issues and claims, once fully litigated and properly decided, should not be subject to further adjudication. Montana v. United States, 440 U.S. 147, 154 (1979); Parklane Hosiery Co. v. Shore, 439 U.S. 322, 327 n.5 (1979). Neither doctrine is rigid and each may be

shaped to assure fairness. See e.g., Montana, supra, 440 U.S. at 164 n.11 ("Redetermination of issues is warranted if there is reason to doubt the quality, extensiveness or fairness of procedures followed in prior litigation"); Parklane Hosiery, supra, 439 U.S. at 330-31. This concern for fairness is most often expressed in the phrase "full and fair opportunity to litigate." Courts of necessity have sought to define this phrase by asking more specific questions. In Parklane Hosiery, for example, this Court suggested, inter alia, the following inquiries: (1) the monetary incentive of the party in the prior litigation; (2) the existence of prior inconsistent judgments; (3) the availability of procedural safeguards in the prior proceeding. The Court concluded that trial courts should exercise "broad discretion" in applying

preclusion.[53] 439 U.S. at 331. Decisions by administrative agencies pose a special problem. Until recently, administrative agency decisions have not been accorded preclusive effect. Not until 1966 did this Court squarely hold that decisions by administrative agencies could in appropriate circumstances preclude judicial litigation of the same issues. United States v. Utah Construction & Mining Co., 384 U.S. 394, 421-22 (1966). Because of the enormous variations in the expertise, independence, authority, procedures and responsibilities of administrative agencies, and of the issues that come before them, the appropriateness of preclusion, and the degree of deference

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[53] While the decision in Parklane Hosiery involved the application of offensive collateral estoppel, the Court noted that there was "no intrinsic difference" between offensive and defensive collateral estoppel. 439 U.S. at 331 n.16.

that may be warranted to a particular agency determination, necessarily depends on the circumstances of each case:

> The reasons behind the doctrine [of res judicata] as developed in the court system are fully applicable to some administrative proceedings, partially applicable to some, and not at all applicable to others. As a matter of principle, therefore, the doctrine should be applied to some administrative proceedings, modified for some, and rejected for others.... [T]he choice is not between taking all or none of the traditional doctrine of res judicata; the doctrine may be relaxed or qualified in any desired degree.... In a great many cases the courts have applied a relaxed doctrine of res judicata to administrative action.

2 K. Davis, Administrative Law Treatise § 18.10 (1972). In deciding whether to apply preclusion to a particular agency, or kind of agency, a court should look to how well the attributes of that agency serve the interests of fairness.

Although this Court has not had occasion since Utah Construction to consider the appropriateness of applying res judicata to particular agency determinations, the Court has repeatedly addressed the closely related question of whether prior arbitration decisions should preclude litigation in federal court of the very issues resolved by the arbitrator. McDonald v. City of West Branch, 466 U.S. 284 (1984); Barrentine v. Arkansas-Best Freight System, Inc., 450 U.S. 728 (1981); Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974). In deciding whether to give res judicata effect to such arbitration decisions, the Court weighed the importance that Congress attached to judicial enforcement of the claims at issue, and the adequacy of arbitration as a substitute for judicial proceedings. McDonald, 466 U.S. at 289-90. The

particular criteria applied in McDonald, Barrentine, and Alexander, we urge, are among the appropriate factors for deciding whether to give preclusion effect to a state agency determination.[54] When applied to the UAPA proceeding in this case, these factors dictate a non-application of the preclusion rules.

1. Lack of Expertise

First, the administrative law judge did not have the required expertise in employment law.[55] Because the UAPA pro-

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54 McDonald discusses these factors in the context of creating a preclusion doctrine outside of § 1738. Respondent submits that § 1738 does not apply to agency decisions (see pp. 77-83), but believe that these criteria would also be relevant to a determination of the extent of deference which the full faith and credit statute would require.

55 As with arbitration, there is no requirement that the hearing examiner be a lawyer. See McDonald, 466 U.S. at 290 n.9. A claim may be heard by either a "hearing officer" or an "administrative law judge." Tenn. Code Ann. 4-5-301. Only the administrative law judges are required

cedure are external to the state FEP scheme, there is not the appreciation or affinity for the issues that would be raised in either state or federal causes of action alleging discrimination in employment. Allowing federal rights to be adjudicated in agency proceedings, particularly those outside the FEP framework, creates a serious risk that these rights will be inadequately protected. A clear example of how a lack of expertise can adversely effect one's rights is the hearing examiner's handling of respondent's charges of racial discrimination.

The petitioners contend that the hearing examiner properly considered Mr. Elliott's charges of race discrimination

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to be attorneys. In the instant case, the hearing examiner was in fact a member of the bar.

as a pretext under Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981) and McDonnell Douglas Corp., v. Green, 411 U.S. 792 (1973) when he purported to analyze them as an affirmative defense to the UAPA charges. See, e.g., Pet. Br. 40-41. This contention is simply wrong and shows clearly why courts and Congress have traditionally been reluctant to give preclusive effect to determinations by administrative agencies. Because the hearing examiner lacked the expertise to apply federal law, he never formulated or analyzed the issues as a federal court would have. McDonnell Douglas discusses the application of pretext to claims of discrimination. In that case the plaintiff had made out a prima facie of racial discrimination and the defendant had articulated a reason for its treatment of the plaintiff, namely

that the plaintiff had engaged in unlawful and disruptive acts against it. This Court held that "the inquiry must not end there" and that a reason is not acceptable unless it "is applied alike to members of all races." 411 U.S. at 804. "Especially relevant to such a showing would be evidence that white employees involved in acts against [the employer] of comparable seriousness ... were nevertheless retained." Id. See also, McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273 (1976). Not only did the hearing examiner fail to apply this rule of law, he specifically excluded comparative treatment evidence. The analysis of two charges is particularly instructive here. Mr. Elliott was charged with violating work rule #22 because he charged [though later paid for]

personal telephone calls to the office. The examiner found that it was common for employees to use University telephones for personal calls but held that actions of other employees was not relevant to issues before him, but might be considered in evaluating disciplines.[56] PA 95. The examiner therefore found that, as a matter of fact, Mr. Elliott had used University telephones for personal calls and had consequently violated the rule.[57]

Similarly, the University charged Mr. Elliott with violating work rule #13 in

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[56] The examiner restricted the presentation of evidence on the practice with respect to personal telephone calls.

[57] The hearing examiner apparently interpreted pretext to mean that the University had accused Mr. Elliott of violating University rules when he, in fact, had not done any thing contrary to the rules. Since he found that Mr. Elliott had violated the rules, the charges were not pretextual.

that he used abusive language while working. PA 160. Again the examiner found that proof of the rule's non-application to other agents was irrelevant:

> "It was undenied that other extension agents have used profanity while working with or among extension service clientele without reprimand."

PA 165-66). The only relevant inquiry to the hearing examiner was whether Mr. Elliott could be said to have violated the rule and, the circumstances notwithstanding, the examiner felt compelled to find that Mr. Elliott, in fact, had used profanity.[58] PA 166.

In addition to excluding comparative treatment evidence on these specific charges, the examiner also excluded

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[58] Specifically, Mr. Elliott was found to have said "wait a goddamn minute, wait a goddamn minute, wait a goddamn minute" in response to Mr. Coley's referring to a black 4-H member as "nigger." A 85, A 165.

evidence of the University's approach to allegations of discrimination and its policies and practices with respect to minority employment. A full and fair opportunity to demonstrate pretext requires that a plaintiff be allowed to present evidence of this kind:

> Other evidence that may be relevant to any showing of pretext includes facts as to the petitioner's treatment of respondent during his prior term of employment; petitioner's reaction, if any, to respondent's legitimate civil rights activities; and petitioner's general policy and practice with respect to minorities in employment.

McDonnell Douglas, 411 U.S. at 804-805. The hearing examiner excluded such evidence as irrelevant to the issues before him.

The findings on racial discrimination, even if this had been an appropriate

forum, would therefore not be entitled to credit because the hearing examiner applied an erroneous view of the law. The district court should therefore have disregarded the conclusions drawn by the hearing examiner and conducted its own inquiry into the issue.

2. Lack of Authority

The hearing provided here also falls short on the second McDonald factor since the examiner had no authority to enforce Title VII or §1983 or to decide issues pertaining to those statutes. The examiner continued to admit his lack of jurisdiction. Indeed it is grounds for reversal that a decision is made "[i]n excess of the statutory authority of the agency."[59] Tenn. Code Ann. §4-5-322(h)(2).

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[59] In general, issue preclusion should not be available where an agency acts beyond its statutory authority:

> If an agency nonetheless presumes to

Proper jurisdiction is a necessary element in the application of preclusion to the decisions of agencies. In Utah Construction, supra, this Court made clear that issue preclusion might be available only when an agency decided issues "properly before it."[60] 384 U.S. at 422.

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decide an issue beyond its jurisdiction, courts are likely to apply vigorously the general principle that preclusion is defeated when strong policies underlie the lines that limit the authority of the tribunal that made a prior decision.

18 C. Wright, A. Miller & Cooper, Federal Practice and Procedure, Jurisdiction, ch 13 §4475 at 768 (1981); see also Restatement (Second) of Judgments, § 83, comment d (1981).

60 As the Court observed in Thomas v Washington Gas Light Co:

> [T]he critical differences between a court of general jurisdiction and an administrative agency with limited statutory authority forecloses the conclusion that constitutional rules applicable to court judgments are necessarily applicable to workmen's compensation awards.

(448 U.S. 261, 281-82)(plurality opinion

See e.g., Sunshine Coal Co. v. Adkins, 310 U.S. 381 (1940) ("[H]ere the authority of the Commission is clear. There can be no question that it was authorized to make the determination.")

3. Lack of Objectivity

The third factor is even more compelling here than in an arbitration proceeding. In arbitration, a third party, the union, has control over how a grievance is presented. Here the adverse agency has total control over how the hearing is conducted. Tenn. Code Ann. § 4-5-301. The agency selects the person who hears the case and retains the right

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of Stevens, J.). The Court proceeded to hold that "full faith and credit need not be given to determinations that [an agency] had no power to make." Id. at 283. Thus the District of Columbia was not required to give full faith and credit to a determination by the Virginia Workers' Compensation Commission.

to accept, reject or modify the findings made by that person. This exercise of power and control by the agency severely jeopardizes an employee's opportunity to obtain remedy for the deprivation of his federal constitutional and statutory rights.

The Court in McDonald was concerned that the union had control over the "manner and extent to which an individual grievance is presented" and that its interests might not be identical to, or compatible with, the interests of the employee. How much more incompatible is the interest of the employee here and the agency. The very entity charged with improper behavior, actshere as the final arbiter.

The University did nothing to temper the effect of the process. Under Tenn. Code Ann. § 4-5-301(d) it could have

requested that the case be heard by an independent administrative law judge from the office of the Secretary of State. Instead defendant Armistead named his assistant, Mr. Pentecost, the hearing examiner. Armistead advised Pentecost in advance that the defendant agency did not intend to be bound by Pentecost's decision, but would itself make the final decision regarding the dispute between the University and the respondent.[61] This

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[61] Letter of W.W. Armistead to B.H. Pentecost, March 5, 1982, p. 2:

> "When you have arrived at a decision, you will reduce your findings to writing. These findings shall be in the form of a proposed decision... You shall forward the original of the proposed decision to my office along with the file in this matter.... I shall then review your proposed decision along with the record as a whole before I render the final decision for the agency."

(Emphasis added).

procedure violated a fundamental tenet of due process that no one be made judge of his own case. Tumey v. Ohio, 273 U.S. 510 (1927).

4. Lack of Procedural Safeguards

As shown above, the procedural rights provided for in the Tennessee UAPA can also be illusory. The hearing examiner, because of the limits of his authority and expertise may, as here, exclude evidence as outside his jurisdiction or irrelevant to the inquiry before him.

In addition, the bias in the process raised serious due process questions. Petitioners contend that the "state proceedings were conducted in virtually the same manner as a trial in ... federal

court" (Pet. Br. 15) is not entirely correct. In a federal court proceeding none of the defendants could have sat as the judge, or would have been permitted to designate as a hearing officer an individual who was either an employee of the defendant University or an immediate subordinate of one of the individual defendants. Neither res judicata nor full faith and credit can be invoked against a party who did not receive due process at the earlier proceeding. Whatever disputes may exist regarding the requirements of the due process clause, it certainly precludes a party from sitting as a judge in a case in which it has a significant interest. Tumey v. Ohio, 273 U.S. 510 (1927). Tumey held that the conviction of a defendant by a judge who was to receive part of the fine violated due process because the judge has "a direct, personal,

substantial pecuniary interest in reaching a conclusion against [Tumey]." 273 U.S. at 523. The judge in Tumey was entitled to only $12 from Tumey's fine; in the instant case the defendants, including Armistead and the University, faced a potential judgment of $1,000,000 if respondent's discrimination claims were sustained. Although Pentecost was not himself a named defendant in the federal action, the likelihood that he would be influenced by the very substantial financial interest of both his employer and his immediate supervisor was sufficiently great as to violate due process as well.

II. THE FULL FAITH AND CREDIT STATUTE, 28 U.S.C. §1738, IS NOT APPLICABLE TO THE UNREVIEWED DECISIONS OF ADMINISTRATIVE AGENCIES

In arguing that full faith and credit applies, the petitioners fail to distinguish between the coverage of the full faith and credit clause of the Constitution, article IV §1, and the federal full faith and credit statute, 28 U.S.C. §1738. While the former applies to the "Judicial proceedings of every other state," the latter applies only to the "judicial proceedings of any court of any State." (emphasis added). The statute by its plain and unambiguous terms does not require federal courts to give preclusive effect to unreviewed agency determinations.

The literal reading of section 1738 is strongly supported by past decisions of this Court. In Kremer v. Chemical Construction Corp., 456 U.S. 461 (1982), the Court continually emphasized this dividing line for the statute's application. First, in describing the critical issue in that case the Court held:

> No provision of Title VII requires claimants to pursue in state court an unfavorable state administrative action.... While we have interpreted the "civil action" authorized to follow consideration by federal and state administrative agencies to be a "trial de novo," Chandler v. Roudebush, 425 U.S. 840 (1976), ... neither the statute nor our decisions indicate that the final judgment of a state court is subject to redetermination at such a trial.

Id. at 469-70 (emphasis in original). This emphasis on the word "court" was expanded on in a footnote accompanying the text:

> Nor is it plausible to suggest that Congress intended federal courts to be bound further by state administrative decisions than by decisions of the EEOC. Since it is settled that

> decisions by the EEOC do not preclude trial de novo in federal court, it is clear that unreviewed administrative determinations by state agencies also should not preclude such review even if such a decision were to be afforded preclusive effect in a state's own courts.

Id. at 470 n.7.[62] This distinction drawn by the Court is consistent with the limitation of 28 U.S.C. §1738, which, by its express terms only "requires federal courts to give the same preclusive effect to state court judgments that those judgments would be given in the courts of the State from which the judgments emerged." (emphasis added). Id. at 466. See also cases cited in n.6 accompanying text; id. at 487 (Blackmun, J. with Brennan & Marshall, JJ., dissenting) (recognizing distinction made by major-

[62] See also n.8 where the Court emphasizes that the deferral provisions of Section 706(c) of Title VII, 42 U.S.C. §2000e-5(c) refers to "agencies.".

ity); id. at 508-09 (Stevens, J., dissenting) (same). See also Allen v. McCurry, 449 U.S. 90, 104 (1980) (legislative history of Section 1983 does not preclude giving "binding effect to a state-court judgment") (emphasis added); Migra v. Warren City School District, 465 U.S. 75,84 (1984) ["P]etitioner's state-court proceeding in this litigation has ... preclusive effect) (emphasis added).

Similarly, the Court in McDonald v. City of West Branch, 466 U.S. 284 (1984), summarily rejected a suggestion that section 1738 had any application to an arbitration proceeding conducted by a municipality, noting that "the plain language" of the statute was limited to actions of state legislatures and state courts. Id. at 288 n.7. None of the lower court decisions relied on by petitioners suggest that section 1738

could somehow be applied to the actions of an administrative agency; on the contrary, those opinions which actually reach that issue hold precisely the opposite.[63]

The petitioners nevertheless provide the Court with no clearly articulated justification for deviating from this "plain language of §1738." McDonald, supra, 466 U.S. at 287. Indeed the petitioners seek to obscure the difference between the Constitutional clause and the statute. Both are spoken of together and the petitioners fail to note the distinct language of the statute. See, e.g., Pet. Br. 23. The omission by the petitioners

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[63] Buckhalter v. Pepsi-Cola General Bottlers, 768 F.2d 842, 849 n.4 (7th Cir. 1985); Parker v. National Corporation for Housing Partnerships, 619 F. Supp. 1061, 1064 (D.D.C. 1985). Accord, Elliott v. University of Tennessee, 766 F.2d 982, 992 (6th Cir. 1985); Ross v. Communications Satellite Corp., 759 F.2d 355, 361 n.6 (4th Cir. 1985); Moore v. Bonner, 695 F.2d 799, 801 (4th Cir. 1982).

is particularly informative since it ignores the distinction made in the Court's recent decisions in Kremer, Migra and Allen, all of which involve state court action. Moreover, the opinion of the Sixth Circuit specifically relied on this plain language in holding § 1738 inapplicable to respondent's section 1983 claim and the same dividing line was recognized by the court in Buckhalter v. Pepsi-Cola General Bottlers, supra, 768 F.2d at 849.[64]

Although the federal courts are not required either by the constitution or by statute to give res judicata or collateral estoppel effect to decisions of state agencies, the courts may at times apply a

[64] The petitioners had originally asserted that this case supported their position (Pet. for Certiorari at 8-9) but now fail to reconition that court's reading of § 1738 with their present position.

judicially fashioned rule of preclusion. McDonald, supra, 466 U.S. at 288. The appropriateness of such a rule depends, at least in part, on the nature and basis of the federal claim involved. Accordingly, we discuss separately in the sections which follow the appropriateness of such a judicial preclusion rule under Title VII and under section 1983.

III. TITLE VII GUARANTEES A PLAINTIFF A RIGHT TO A JUDICAL DETERMINATION OF HIS CLAIMS REGARDLESS OF ANY ADMINISTRATIVE DECISIONS REGARDING THOSE CLAIMS

The Court has already held in Kremer v. Chemical Construction Corp., that the prior determination of a section 706(c) deferral agency will not preclude either party from obtaining de novo judicial

determinations in federal court.[65] Petitioners do not challenge this holding, but rather acknowledge that the language of section 706 of Title VII can be considered "an implied repeal of the full faith and credit statute." Pet. Br. 34. The petitioners nevertheless seek to avoid the holding in Kremer by contending 1) that Kremer was not meant to apply to agencies acting in a "judicial capacity" and (2) that since the University of Tennessee is not a deferral agency, the implied repeal does not apply. Neither of these assertions withstands analysis.

The first contention simply ignores the Court's unequivocal statement in Kremer that "unreviewed administrative determinations by state agencies" should

[65] Section 706(c) requires the EEOC to give limited deferral to adequate state agencies.

not be given preclusive effect. 456 U.S. at 470 n.7. No restriction or qualification is placed on this rule. The petitioners' reliance on footnote 26 in Kremer is misplaced. They assert that the reference to United States v. Utah Construction & Mining Co., 384 U.S. 394 (1966), supports their position since the Court there stated that principles of res judicata may apply to the decisions of administrative agencies acting in a "judicial capacity." Id. at 422. A careful reading of Kremer, however, demonstrates that the petitioners read too much into this footnote. First of all, in holding that unreviewed state determinations were not entitled to preclusion, the Court cited four lower court decisions. Garner v. Giarusso, 571 F.2d 1330 (5th Cir. 1978); Batiste v. Furnco Constr. Corp., 503 F.2d 447 (7th Cir. 1974), cert.

denied, 420 U.S. 928 (1975); Cooper v. Philip Morris, Inc., 464 F.2d 9 (6th Cir. 1972); Voutsis v. Union Carbide Corp., 452 F.2d 889 (2d Cir. 1971), cert. denied, 406 U.S. 918 (1972). In three of these cases (Garner, Batiste and Cooper), the lower court held that preclusion was not appropriate even though the agency had full enforcement authority and provided for adjudicative procedures.

Secondly, the Court's discussion of Utah Construction occurs in the section concerning due process requirements of reviewed agency determinations. Thus the adjudicative capacity of the agency is discussed in an entirely different context from the Court's discussion of the non-preclusive effect of agency decisions.

Third, the petitioners also ignore the context of the statement quoted from Utah Construction. In Part II of that

opinion, this Court clearly states that no deference is due an agency which does not have jurisdiction to decide an issue:

> Of course, if the findings made by the Board are not relevant to a dispute over which it has jurisdiction, such findings would have no finality whatsoever.

384 U.S. at 419 n.15 (emphasis added). Since the Title VII issues were not "properly before" the hearing examiner, preclusion principles do not apply to his findings.

Finally, the petitioners ignore this Court's decisions in Alexander and Chandler which establish the right to trial de novo for Title VII causes of action. It is impossible to reconcile this right with the rule of preclusion urged by petitioners.

The petitioners argument with respect to the preclusive effect of non-deferral agency decisions is similarly flawed.[66] The argument is based on 706(b)'s requirement that the EEOC give "substantial weight" to deferral agencies. The petitioners contend that the failure to indicate what weight should be given to non-deferral agencies indicates Congress' intent to give preclusive effect to such agencies. Rather than requiring greater deference, the unreviewed decisions of agencies outside of the Title VII scheme are entitled to less, if any, weight.

Both the language and reasoning of Kremer apply with even greater force to agencies acting outside of the Title VII enforcement scheme as they do to deferral

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66 Petitioners expressly limit their argument to the effect of decisions by non-deferral agencies "acting .. outside the Title VII enforcement scheme." Pet. Br. II, 31.

agencies. Kremer holds broadly "the 'civil action' authorized to follow consideration by federal and state agencies to be 'trial de novo'" (quoting Chandler v. Roudebush, 425 U.S. at 844-45). 456 U.S. at 469. As the Court noted, the "substantial weight requirement" was added to Title VII in 1972, not because the EEOC was giving too much weight to deferral agency decisions, but because it was affording them too little significance. 456 U.S. at 470 n.8.

It was the intent of Congress that the deferral provision would insure that EEOC and federal courts would give proper deference to proceedings necessarily invoked through Title VII. It resulted from a careful balancing of the de novo requirement in Title VII and the important role played by state and local FEP agencies in the implementation of Title

VII. At the same time there was "a Congressional intent to allow an individual to pursue independently his rights under both Title VII and other applicable state and federal statutes." Alexander v. Gardner-Denver Co., 415 U.S. 36, 48 (1974). The legislative history of both the 1964 Act and the 1972 amendments shows that Congress was concerned with the effect of Title VII on state fair employment statutes. While there was disagreement on the weight to be given to state proceedings, there was general agreement that the federal scheme should only defer to "adequate" state systems. Senator Humphrey, one of the drafters of the 1964 deferral provision, recognized that adequate state fair employment agencies were an important element in enforcement and stated that "[t]he most important changes give greater recognition to the

role of state and local action against discrimination." 110 Cong. Rec. 12,707 (1964).[67] Senator Clark underscored the limits of this deference.[68] In contrast, Title VII was not intended and did not apply to rights and obligations pursued under other federal and state statutes. Alexander v. Gardner-Denver, 415 U.S. at 48-49 and n.9.

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67 See, also, 110 Cong. Rec. 7205 (1964) (remarks of Sen. Case); id. at 2728 (amendment proposed by Rep. McClory); id. at 7214 (interpretive memorandum of Senators Case and Clark); id. at 10,520 (remarks of Sen. Carlson).

68 "It is important to note that Title VII is so drafted that the States and the Federal Government can work together.... [T]he State and the municipal agencies will continue to operate, and State laws will continue to in force, except where they are inconsistent with Title VII ... [T]itle VII meshes nicely logically, and coherently with the state and city legislation already in existence ... [b]ut where there is no state or local law, a Federal law is essential."

110 Cong. Rec. 7205 (1964).

The 1972 amendments similarly were addressed only to giving proper deference to adequate state fair employment agencies.[69] Congress again stated its intent that Title VII claims should be determined by courts and that its provisions not "affect existing rights granted under other laws." S. Rep. No. 92-415, p. 24 (1971).

In adopting the 1972 amendments to Title VII Congress considered at length proposals to give the EEOC power to issue cease-and-desist orders, subject to substantial evidence review in federal courts. Although these proposals would have given EEOC determinations far less

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[69] Section 706(b) provides that EEOC should give "substantial weight" to findings and orders "in proceedings commenced under State or local law pursuant to [the deferral provision]. Deferral under Section 706(c) only occurs if there is an adequate state agency as determined by EEOC.

weight than petitioners now urge for certain state agency decisions, Congress ultimately refused to impose such a limitation on judicial consideration of Title VII claims.

The concerns that led Congress to refuse to limit judicial reconsideration of EEOC determinations are fully applicable to any proposed limitation of judicial resolution of claims previously considered by state agencies. Senator Dominick, the leading opponent of cease-and-desist authority for EEOC, argued that the final resolution of Title VII claims was a sensitive matter that belonged in the courts rather than any agency:

> Determination of employment civil rights deserves and requires non-partisan judgment. This judgment is best afforded by Federal court judges who, shielded from political influ ence by life tenure, are more likely to withstand political pressures and render decisions in a climate

tempered by judicial reflection and supported by historical judicial independence.[70]

If, as petitioners urge, the decisions of non-deferral agencies are binding on federal courts, then actions of such non-deferral agencies would be of far greater importance than actions of section 706(c) deferral agencies or of the EEOC itself. Kremer emphasized that it was not "plausible to suggest that Congress intended federal courts to be bound further by state administrative decisions than by decisions of the EEOC", noting that even EEOC determinations "do not preclude a trial de novo in federal court..." 456 U.S. at 470 n.7. It is even more implausible to suggest that

[70] S. Rep. 92-415, p. 85 (1971). Similar concerns were expressed in the minority views appended to the House Report. H.R. Rep. 92-238, pp. 58-63 (1971).

Congress, having specifically delineated the particular state agencies to which the EEOC should initially refer complaints and having refused to extend the powers of EEOC, intended to attach greater significance to the determinations of those state agencies whose lesser expertise or remedial authority made deferral inappropriate. The hearing under Tennessee's UAPA, being outside the enforcement scheme of Title VII, is thus not intended to affect or be affected by the provisions of Title VII. Analytically such a proceeding should be treated the same as the arbitration proceeding in Alexander v. Gardner-Denver Co, 415 U.S. 36 (1974), for preclusion purposes.[71]

[71] The Court in Kremer noted that one of the important differences between an arbitration and state fair employment proceedings is that the former is not part of Title VII's system:

> [U]nlike arbitration hearings under

IV. PRIOR STATE AGENCY DETERMINATIONS HAVE NO PRECLUSIVE EFFECT IN SECTION 1983 ACTIONS

A. Prior Decisions of This Court

Six members of this Court have already expressed the view that state agency determinations should not be treated as preclusion in section 1983 cases.[72] In Moore v. East Cleveland, 431 U.S. 494 (1977), the Chief Justice asserted that exhaustion of state adminis-

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> collective-bargaining agreements, state fair employment practice laws are explicitly made part of the Title VII enforcement scheme. Our decision in Gardner-Denver explicitly recognized the 'distinctly separate nature of these contractual and statutory rights.'

Kremer, supra, 456 U.S. at 477.

[72] The complaint in this action raised claims under several different reconstruction era civil rights statutes. Petitioners apparently assume, as do we, that the preclusive effect of a prior state agency determination is the same under all of these statutes.

trative remedies would not preclude a de novo consideration of constitutional claims in federal court

> because state administrative agency determinations do not create res judicata or collateral estoppel effects. The exhaustion of state administrative remedies postpones rather than precludes the assertion of federal jurisdiction.

431 U.S. at 524 n.2 (dissenting opinion). In Patsy v. Florida Board of Regents, 457 U.S. 496 (1982), Justice Powell in an opinion joined by the Chief Justice, also expressed the view that exhaustion of state administrative remedies "does not defeat federal-court jurisdiction, it merely defers it." 457 U.S. at 532. (dissenting opinion). In Fair Assessment in Real Estate v. McNary, 454 U.S. 100 (1981), four members of the Court expressed the view that the petitioners in that case would not have forfeited their right

to bring a federal action by first pursuing the available administrative procedures, since such action would have resulted not in "the displacement of the section 1983 remedy, but [in] the deferral of federal court consideration pending exhaustion of the state administrative process." 454 U.S. at 136 (concurring opinion of Justices Brennan, Marshall, Stevens and O'Connor) (emphasis in original).

Although each of these decisions was concerned with the propriety of requiring exhaustion of state administrative remedies, the passages quoted above are not limited to the case of involuntary exhaustion.[73] It is the nature of such

[73] The Chief Justice in Moore described a number of advantages that might follow if a potential federal plaintiff were first to utilize available state administrative remedies, including application of any specialized experience the agency might have, compilation of a record which could be used by the federal courts, and resolution of the controversy short of federal litigation. 431 U.S. at 524-25. Voluntary utilization of state administrative remedies is equally likely to entail such benefits.

administrative proceedings which negates any binding effect.

Even if section 1983 does not prevent in all cases giving preclusive effect to state administrative determinations, it does not follow that the application of res judicata or collateral estoppel is appropriate in all or even most cases. The Court should determine whether this is the type of agency to which preclusion principles should apply. McDonald v. City of West Branch. See supra, pp. 57-76.

B. Application in Tennessee

The petitioners summarily state that "an adjudication by a state agency acting in a judicial capacity is entitled to preclusive effect in Tennessee Courts."

Pet. Br. 20. This bare assertion does not describe the Tennessee law on preclusion nor conclusively show what preclusive effect, if any, Tennessee courts would accord the decision in this case. First, collateral estoppel will not be applied by Tennessee courts unless the issue determined in the first proceeding was necessary to the judgment. Scales v. Scales, 564 S.W.2d 667, 670 (1978); King v. Brooks, 562 S.W.2d 422, 424 (1978); Shelley v. Gibson, 400 S.W.2d 709, 714 (1966). In addition, the body making the first determination must have jurisdiction to decide the issue. The three cases cited by the petitioners illustrate this point. In Polsky v. Atkins, 197 Tenn. 201, 270 S.W.2d 497 (1954), the Commissioner of Finance and Taxation had specific statutory authority under Tenn. Code Supp. 6648.17 (1950) to decide the

issue -- the fitness to hold a liquor license. Similarly, in Purcell Enterprises, Inc. v. State, 631 S.W.2d 401 (Tenn. App. 1981), the issue in a contract action had been previously determined by the Board of Claims which had jurisdiction pursuant to Tenn. Code. Ann. § 9-80-207 et seq. See also Fourakre v. Perry, 667 S.W.2d 483, 488 (Tenn. App. 1983) ("The plaintiff submitted the issue of negligence ... to a tribunal having full authority to decide that issue").

While the Tennessee courts have not definitively answered the question of which bodies have jurisdiction to adjudicate employment discrimination issues, the decisions strongly suggest that such authority vests either in the Tennessee Human Rights Commission or not within the state system. DePriest v. Puett, 669 S.W.2d 669 (Tenn. App. 1984); Chamberlain

v. Brown, 223 Tenn. 25, 442 S.W.2d 248 (1969). In DePriest a discharged employee raised the issue of religious discrimination in her appeal from a decision by the Civil Service Commission upholding her dismissal from state employment. Her appeal urged, inter alia, that the standards of "reasonable accommodation" under 42 U.S.C. §2000e et seq., applied to the statute governing the dismissal and/or demotion of an employee, Tenn. Code Ann. § 8-3227, as well as to the rules applicable to the Tennessee Human Rights Commission. She claimed that the statutes governing the Human Rights Commission and the Civil Service Commission should be read together or construed in pari materia so as to afford her the benefit of the more demanding standard under the Human Rights statute. The court rejected this claim:

> The courts of this state have often said that statutes relating to the same subject matter should be contrued together.... The two statutes here, however, do not relate to the same subject matter .... [O]ne deals with discrimination in the work place while the other is concerned with establishing and maintaining a merit system for state employees....
>
> The intent [of the legislature] is clear enough from the plain reading of the statutes. The enforcement of claims pursuant to T.C.A. §4-21-101 et seq. must be brought before the Human Rights Commission.

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669 S.W.2d at 676. (Emphasis added).

While the Tennessee Supreme Court has indicated that the Human Rights Commission has general jurisdiction over employment discrimination claims within the state, it is doubtful whether this encompasses rights asserted under 42 U.S.C. Section

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[74] The court saw nothing wrong in allowing the plaintiff to "separat[e] her avenues of relief" since the statutes concerned different subject matter. Id.

1983. In Chamberlain v. Brown, supra, the court held that Tennessee state courts did not have jurisdiction to hear such claims:

> [A]fter considering the Congressional Records pertinent to this legislation ... we are firmly convinced that these statutes creating this action were directed to the federal trial forum, not the respective states. In any event no policy of this state can be found in its history, judicial or otherwise, that would require the judicial branch of the government of Tennessee to entertain such action. Id. at 250, 251, 223 Tenn. at 31.

223 Tenn. at 31, 442 S.W.2d at 250-51. Having been divested of jurisdiction by the state supreme court, it is unlikely that a lower state court would hold that an administrative agency had jurisdiction to consider such claims in the absence of

positive state legislation[75] or that an individual would be precluded from raising the claims in a subsequent federal suit. See Whitfield v. City of Knoxville, 756 F.2d 455 (6th Cir. 1985) (Plaintiffs unable to raise ADEA claims in Tennessee state action not estopped from raising such claims in federal court). If, despite Tennessee's position with respect to section 1983 claims, the state courts would apply preclusion to an agency's decision, it would be inappropriate for the federal court to do so:

> [T]he federal courts could step in where the state courts were unable or unwilling to protect federal rights. [Monroe v. Pape, 365 U.S.167, 176, 173-74]. This understanding of §1983 might well support an exception to res judicata and collateral estoppel

[75] Compare Parker v. Fort Sanders Regional Medical Center, 677 S.W.2d 455 (Tenn. App. 1983) (state court has jurisdiction for federal claims under ADEA, in part, because Tennessee had enacted an age discrimination statute in 1981).

> where state law did not provide fair procedures for the litigation of constitutional claims, or where a state court failed to even acknowledge the existence of the constitutional principle on which a litigant based his claim.

Allen v. McCurry, supra, 449 U.S. at 101. See also McNeese v. Board of Education, 373 U.S. 668 (1963) (exhaustion of state administrative remedy not necessary under section 1983 where such remedy not adequate).

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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A P P E N D I X

TRANSCRIPT EXCERPTS

MR. PARKER: Thank you sir. We would respectfully submit to the Hearing Examiner, that the statement of counter-issues are completely improper, and we would point out to the Hearing examiner that a civil proceeding, such as is presently underway, in the United States District Court, for the Western District of Tennessee, the Jackson Division, wherein the Employee, through his distinguished counsel has sued the University Agricultural Extension Service and many of the University's officials for the exact charges that have been raised in the counter-charges by counsel at this time; and that those issues are not before this proceeding, but are in fact before the Federal Court in another matter; and we will also point out that part of the reason why this proceeding has been delayed unto this day, is because of the Agricultural Extension Service was under a Federal Court Order, not to do anything regarding the employee and his employment relationship, but to leave that relationship intact as the University had done so, so, that the Employee's rights would in no way be prejudiced or in any way touched.

The University has no intention whatsoever of touching the employee's rights until, if at such time, there is proof adduced and proof sustained that there is grounds for his employment to be terminated with the University; and matters that are raised in the counter-issues by distinguished counsel are before another court, and not before this Hearing.

This Hearing is for one sole purpose, that was pointed out by the Vice-President from the University, when he instituted this proceeding, and that is to determine if there are grounds to terminate Mr. Elliott from his employment with the University of Tennessee Agricultural Extension Service and the University respectfully, completely and totally submits that Mr. Elliott's race is not an issue in this matter; and there has been no charge by the University that he is unable to do his job because of his race, nor would the University ever make such a charge, because such charge is abhorrent and is false and is not true, nor does the University even charge the employee with inability to do his job.

The University has only charged that for some reason did not do his job.

i, 33-35

* * *

HEARING EXAMINER: All right, gentlemen, and I am referring to counsel for the respondent and complainant, now, up to this point, we have had, I think, very wide discussion, and the Hearing Officer has tried to be as receptive and as lenient as possible, which I have the authority to do , I believe under the A. P. A.

i, p.36

* * *

MR. WILLIAMS: ... [W]e asked in Interrogatory number seven, to, in regard to the alleged charge that the Defendant violated work rule number twenty-four, to identify and describe the exact standard

used or applied in determining unacceptability to the University and the response, and they are bound by this, was as follows: "The Standard to use of unacceptability by the University is that behavior which is determined by the University supervisors of the Agricultural Extension Service to be unacceptable, and is a question of fact for the Hearing Examiner in this case."

Now, how can anyone have any advance notice of that? The University might determine that Mr. Elliott's conduct, of employing a rather controversial lawyer, by the name of Mr. Avon Williams as his counsel, was unacceptable as I am sure that it is unacceptable to the University, but it is not a ground for depriving him of his job there; and they could not do so.

In response to unacceptable, unacceptability to the community, they say see the answer to interrogatory number seven (b). So, they are saying that the University also determines what is acceptable or unacceptable to the community.

I respectfully submit, let's actually, when we get into this matter, in Federal Court, as we will ultimately, uh, what we are going to show is that we have got some Ku Klux Klan white, type white persons, up in Gibson County, and maybe a few in Madison County here too, who didn't want Mr. Elliott to play golf at the Country Club which was open for access to all white persons, virtually all, but not to blacks; and that as a result of efforts by the NAACP to secure admission of Blacks to the golf course of the Gibson Country

Club, that a gentlemen by the name of Jack Barnett, who used the word "nigger" and admitted he did it under oath --

HEARING EXAMINER: Excuse me, can I interject here?

MR. WILLIAMS: Well I am just, that is exactly why --

HEARING EXAMINER: I believe that you are expanding. You do as, you go right ahead, but I believe that you are elaborating on some things that are not relevant here.

i, p.76,77

Q. **(By Mr. Williams)** And uh, they had this work rule twenty-four at that time, didn't they, about the behavior unacceptable to the University and the community?

A. Yes.

Q. And so you made a determination for being fined for public drunkenness, was not behavior unacceptable to the flagship University of the Great State of Tennessee, is that right?

MR. PARKER: Your Honor, we would like, first of all to object to the -- the charges that have been made in this case arise out of Madison County under its present extension leader, and how charges have been handled in other counties, involving other employees, are other matters; that are not pertinent to this matter.

i, p.149

MR. PARKER: Mr. Hearing examiner, if this line of questioning [relating to the treatment of other employees] is allowed, we think that it would be first necessary for distinguished Mr. Williams to establish when this work rule was created and whether the incident that he is trying to ask the witness about, occurred after the work rule was in place; but we still would object because this employee was disciplined by his extension leader in Madison County, not by some other person, some other place.

ii, p.151

HEARING EXAMINER: Let me make a comment, if I may in response to, both the objection and your comment, Mr. Williams.

Again, I would relate to my charge here, and it relates specifically to trying to determine based on the evidence that is presented here, as to whether or not Mr. Elliott, the respondent here, actually did violate certain work rules.

This line of questioning to me gets, I think, away from this particular subject. You have another forum, I believe that you are already in court, to bring this, and therefore, I am going to sustain this objection as I don't believe that it is relevant to this particular factual issue.

MR. WILLIAMS: Then I take it, the Hearing Examiner is going to determine subjectively, in his own mind, and without regard to actual interpretations by the University, of this work rule --

HEARING EXAMINER: I am going to listen to it and I am going to allow broad evidence to be presented, even though it might be even sometimes a little bit broader than what, even counsel, would want to have admitted.

I am trying to allow sufficient information here, so that I can determine whether or not, or make recommendations as to whether or not this incident occurred. Now, I cannot in this particular forum determine whether or not there was discrimination or segregation. I don't see this as my charge. I will allow you to proceed with this line of questioning, but I cannot allow you to bring in other employees and other people who, I would certainly, sustain Mr. Parker's objection to that. Other people have rights that would be violated also here.

We want to be as lenient as we can, and will allow you to proceed, and would like for you to keep it if you can related to the issues.

i, p.152-153

* * *

MR. WILLIAMS: Well, I would respectfully submit, and I urge, as a matter of the record, that anything pertaining to Jack Barnett, and his motivation and the proof that there are here seeking to establish, the phone calls, which he alleges that the, Mr. Elliott made, and anyting pertaining to their motivation is relevant in reference to any allegation by the University that it is involving itself in this affair by saying that that it is unacceptabl behavior to the University.

That was the only part that I was trying to make, Mr. Hearing Examiner, and I will try to abide by the ruling.

HEARING EXAMINER: Proceed.

MR. WILLIAMS: Yes sir.

Q. Now, sir, as a native of Clarksville, Mississippi, would you not say that you are familiar with the phrase male black?

A. Yes sir, I am familiar with it.

Q. And would you not say that you have seen and known about segregated country clubs?

MR. PARKER: Again, Your Honor, I am going to object again. The witness' background, whether he is from Mississippi or from New York City is irrelevant to this hearing. I object to all of this line of questioning. I think that we have gone too far. This is not going to impeach this witness. He can ask him how he knew the knowledge that was here, about the M/B designation on this report; and what it meant, who made it, what he did with it, and all of that, or whether he refused to do anything with it, or whether he recommended prosecution, because of it; or whether he refused to recommend prosecution from it; and all of that. But, to go to where the man's background is completely irrelevant, and I strongly object; and I have a personal objection to it also.

Let the record reflect that I am from Mississippi, and I strongly object to any inference that somebody from Mississippi can't be objective.

HEARING EXAMINER: Sustained.

Q. All right, I will now hand you Exhibit Fourteen and will ask you to read that last line on the last page, on the third page, Exhibit Fourteen?

A. "8-30-79, info referred to Humboldt Police, Lt. Espy, 855-1121 for prosecution. Subject is male black trying to join the country club."

iii, p.421-423

MR. PARKER: Let me just say that he is not understanding my objection. I think that certainly he can ask the witness about his bias, however, I think that it is wrong to ask Senator, this witness about the bias of the University. I think that he should ask this witness about his bias, not the University's bias. That is what I am talking about. That is the reason that the case against the University that is in Federal Court, should not be tried through this witness here. This witness could testify as to his bias, and that is my objection.

iv, p.486

* * *

MR. PARKER: Just a minute, Your Honor. I would like to interpose, if there is some purpose relating to this hearing by bringing the evaluations in for other employees, I think it ought to be shown what that purpose is. Other

employees are not on trial here. I don't think it is proper that their evaluations be paraded before this public hearing unless there is a purpose to be shown. The issue here is not whether other employee did their work, but whether Mr. Elliott did his work and I am not going to let the hearing become a trial of other employees.

ix, p.111

MR. WILLIAMS: Mr. Hearing Examiner, I don't understand this matter, in order to protect other employees. Public employees have no rights of protection of rating and evaluations that are given them. We certainly have a right to have them received as evidence and cross examine this gentleman on them. These are not formal ratings. There are in effect recommendations he said that he made to the district supervisor. They are his recommendations with regard to these employees and if those recommendations tend to show a racial pattern, we are entitled to show that.

They do show a racial pattern.

MR. PARKER: They do not. Mr. Butler has been rated low right here too. Mr. Elliott is getting all the due process that the law gives him, and it is wrong to prejudice their rights without due process to them, as their ratings may go up and down. This is the other male agent, and his ratings have been low too.

HEARING EXAMINER: They may be similar almost, but I wouldn't call them patterns.

ix, p.124,125

MR. WILLIAMS: Well, didn't they raise the specific question that anybody knew Mrs. Pipkin, a sweet little old elderly white lady was totally incompetent, she was the talk of the town and yet you did nothing about it?

MR. PARKER: I am going to object again, because the --

HEARING EXAMINER: Sustained.

MR. WILLIAMS: Well, why, Mr. Hearing Examiner. I respectfully submit that if, that anything that related to an issue involving Mr. Elliott, this was raised at the Ag Committee meeting in reference to his, the effort to attempt to discharge Mr. Elliott. Now just because Mrs. Pipkin is white, she is not sacrosanct if Your Honor please and this gentleman is entitled to have uh, this uh, Honorable Court to know what actually went on.

ix, p.132

MR. PARKER: Your Honor, first of all, I strongly object to the, my distinguished counsels statement that I am trying to destroy his client or that he Dean of Agriculture Extension Service is trying to destroy his client. The purpose of this hearing is simply to find out if there are facts that would support a recommendation to terminate by this Hearing examiner or that would not. That is all it is for. The University does not want to destroy Mr. Elliott, but the lives of other people and their ratings do not, do not show whether or not Mr. Elliott did or did not do his job. They are a completely separate issue and there is absolutely no reason for this hearing to

look into the background of a woman who is dead, who, there is nc way to take any punitive action against her if she, if such should be taken, it serves no purpose at all, and it shouldn't be looked into. We object to it. Again, there is a pattern here of trying to try this case by trying other people and that is wrong. This is a case to try to find out whether or not there are grounds either not or to recommend termination of Mr. Elliott.

HEARING EXAMINER: Would you read the question again so that I can determine whether or not I want to make a retraction or sustain the objection.

COURT REPORTER: Everybody knew that Mrs. Pipkin, is that the right name? Was totally incompetent and the talk of the town and yet you did nothing about it?

HEARING EXAMINER: Objection sustained.

Q. **(By Mr. Williams)** Were you asked by members of the County Agriculture Committee to investigate the question of the compenency of Mrs. Pipkin to do her job?

A. I was talked to by members of the Agriculture Committee about Mrs. Pipkin.

Q. All right, which members talked to you?

A. Mr. Donnell and Mr. uh, Arthur Johnson.

Q. Did Mr. Boone talk to you?

A. No sir.

Q. Mr. Wallace Ivy?

A. Mr. Ivy did not. Mr. Boone may have mentioned it to me. Mr. Boone brought it up in a committee meeting.

Q. What did Mr. Boone say about it in the Committee meeting?

A. Just asked a question about it?

Q. What question?

A. I do not recall.

Q. Well, what were you asked by Mr. Bonnell and Mr. Johnson about it? What did they say?

A. Senator, I believe the uh, things that have past and the things that are concerning Mrs. Pipkin --

Q. What did they say about it please sir?

A. They asked me about the fact of Mrs. Pipkin's competence and whether or not she was doing an outstanding job.

Q. They questioned some of the things that they had heard concerning Mrs. Pipkin and I looked into it, I dealt with them, I --

Q. Did they tell you that people were talking about her? Excuse me, I shouldn't have said that, go on.

MR. PARKER: Well, going back again, just what we objected to , Again, I am trying to be just a cooperative as I can

be, but, it has already been ruled not to go back into Mrs. Pipkin in a personal way and I object to it.

MR. WILLIAMS: If the Court please, I am asking about official proceedings of the very committee which is uh, which uh dealth with Mr. Elliott and he said that, uh that uh they asked him uh, uh, uh about her competency and now my next question is going to be what did he do about that.

MR. PARKER: Your Honor, if I could make one statement. This hearing is not a catharsis to lay out the dirty laundry of the Agricultural Extension Service. This hearing is, this hearing regards Mr Robert Elliott. If there are other matters of which people may have information, they should bring it to the university and let the university investigate it. This not a grand jury, this is not the place to accuse other people who have privacy rights that they may have done something wrong or did do something wrong. Those people have rights and we have responsibilities as university officials to see that those rights are protected. If people have information about other people doing something wrong, they can bring it to the Dean of the Agricultural Extension Service and he will investigate it. And it is wrong to do it this way. it is very wrong.

MR. WILLIAMS: I will respectfully submit --

HEARING EXAMINER: If you please, let me speak then and you may speak. This has come up, I say at least, well it came up when we were here before and it has come up several times today. I have tried to relate what I think my job is, what I see

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MR. WILLIAMS: I will respectfully submit --

HEARING EXAMINER: If you please, let me speak then and you may speak. This has come up, I say at least, well it came up when we were here before and it has come up several times today. I have tried to relate what I think my job is, what I see

my job to be, and I have been as lenient and I use the word lenient I guess a dozen times here, uh, I don't see any point in continuing to bring these things up, and I think Mr. Parker is absolutely correct in the lives of other people. They are not on trial here. I see what your line of questioning relates to, whether or not I think I know what it relates to, uh, I cannot permit you to continue to bring in uh competence or incompetence or whether it is racial slurs or whatever it might be relative to other people. I don't. I, let's try to get, the fact remains that as Hearing Officer, sooner or later I am going to have to try to determine whether or not these charges are true, and I will do my best to use what discretion that I have relative to this whole line of questioning. Now you can take that for whatever it is worth Mr. Williams. I will do the best I can, but I am going to have to sustain this objection and I believe I am totally right in doing it and I believe if I am unfair --

MR. WILLIAMS: It doesn't do any good to permit me to be heard if you sustain the objection before I speak.

HEARING EXAMINER: I am talking about the objection that I just sustained relative to this lady. I understand your implication there also, but you are incorrect. I will advise you of that.

ix, p.134-138

* * *

Q. **(By Mr. Williams)** Why are Miss Judy Cloud's records not in the file over there?

A. Miss Judy Cloud's records were in the file, the ones that I had asked for. They are only required to be kept for a period of three years. One year is in the one file and then the past two years are in our files.

Q. Now they had records in the file all the way back to 1971 prior to this proceeding against Mr. Elliott, didn't they?

A. Some agents have them that far back, and some throw them away when the three-year period is past.

* * * **xi, p.29**

MR. WILLIAMS: I am requesting, Mr. Hearing Examiner, that those records which this witness says he examined of all the other employees for that year and that he says were in good form be furnished and made an exhibit in this case.

MR. PARKER: Object as being irrelevant and immaterial to the charges against Mr. Elliott.

HEARING EXAMINER: I believe we have been over this before. Sustained.

* * * **xi, p.33,34**

MR. WILLIAMS: Well, turn to the next page, sir, and look down at August 11th where it is encircled there, it says at 9:45 one of your personnel left for the grocery store and lunch and arrived back at 1:00 p.m., and is signed, "Judy." That is Judy Cloud again, isn't it?

A. That's right.

Q. Do you know what she did at the grocery store?

A. No, sir.

Q. Do you know which grocery store?

A. No, sir, I do not.

Q. How would anyone looking at this record have been able to determine where she was?

MR. PARKER: Object to that question. Miss Cloud is not on trial. She is a home demonstration agent. She makes demonstrations. She has to go to the grocery store. Without her being here to explain, it is improper to have someone else explain what she thought. I object to it.

MR. WILLIAMS: The witness has said --

HEARING EXAMINER: The objection is sustained.

xii, p.156,157

HEARING EXAMINER: Read that, if you would. Specifically which one are we referring to?

A. **(By the Witness)** Rule 22, "Using University telephones for personal calls without permission except in an emergency or charging personal calls to the University."

Q. **(By Mr. Williams)** This is prohibited under that work rule, isn't it?

A. What's what it says.

Q. Why haven't you enforced that as to local personal calls in your office?

A. I don't know how much difference it makes, but the telephones in my office are not University telephones. They are Madison County phones. This would certainly not be something that I would ask each employee, including Mr. Elliott, to come to me and ask me each time he wanted to make a phone call. I have not had any problem with this being a persistent problem, and I have not felt I need to deal with it.

. . .

Q. As a matter of fact, you know that Miss Judy Cloud would sit for hours and talk to her boyfriend on the phone over there?

MR. PARKER: Object, Your Honor.

HEARING EXAMINER Sustained.

Q. **(By Mr. Williams)** But you never investigated the extent to which any of your white employees were talking on the phone to their families or their boyfriends on any kind of personal business here in the City of Jackson, did you?

MR. PARKER: Object, Your Honor.

HEARING EXAMINER: Objection sustained.

xiii, p.12-14

* * *

Q. **(By Mr. Williams)** And I take it at this time that you all volunteered to help Mr. Shearon, was in December of 1981, that was when Miss Pipkins passed away?

A. Yes.

Q. And you were aware about the scandal about her performance too, weren't you?

MR. PARKER: Your Honor, I object to this questioning about Miss Pipkin.

MR. WILLIAMS: I would respectfully call to the attention of the Hearing Examiner, that we filed a counter statement of counter issues in this case, and the issues of racial discrimination is an issue in this case and they are in Exhibits two and three. I would respectfully request that the Hearing examiner reconsider inasmuch as we have raised very grave constitutional questions in those statements and counter issues and as the Hearing Examiner for the University of Tennessee, it is a denial of the university under those constitutional statutory constitutional provisions for the Hearing Examiner to absolutely refuse to hear testimony regarding, with regard to uh the treatment of the university officials for other persons who were white in respect to matters of which there were complaints. They have a right to --

HEARING EXAMINER: I believe we have heard a substantial amount of testimony as it relates to this particular objection. It is sustained.

xvi, p.32

* * *

(**HEARING EXAMINER**): I think that we spent quite a bit of time discussing the counter-issues on the first morning, the first day of the hearing; and, perhaps we dispense with those to your satisfaction, but I have, I believe I have since allowed a great deal of testimony relating to the racial issues, perhaps trying to get to the underlying motives behind it and so forth. I have also indicated that there are certain factual issues relating to his job performance, the question of whether or not there were violation of University work rules, and these are something I have to deal with, and I am going to try to take everyting into consideration in this hearing, that is within my prerogative, as Hearing Officer, within the confines of this Administrative Procedures Act.

Now, as it relates to this particular document, I am of the opinion that if the audit were complete, and had been finally, if this was a final document, I am of the opinion that it would not be admissible, if it were, but as it is, as an incomplete document, I certainly feel that until and there may be some questions that have been already brought in here, that are incomplete that ought to be considered just as well, Mr. Williams, and I will assure you that this Hearing Officer will do these things.

So, but I am going to sustain this objection.

* * * xix, p.128

MR. PARKER: I would like to state a continuing objection for the record. The University is being placed in a position to where it is going ot have to try a

Title VII discrimination lawsuit here at this forum, and there is no jurisdiction in this forum for such a case. The charges have been stated, for this hearing, and it is -- I continue, I will continue to object to all efforts to try to force the University to try a Federal lawsuit here, in this hearing.

I know that Senator Williams is not going to be willing to bind himself to whatever proof that he puts in relative to pretext here, in his Federal lawsuit; and if he is willing to bind himself, so that no further proof would be placed in that case, then I would be willing to discuss that. But, I know that he is not going to do do that, and it is improper to make the University try that case twice, and it should not be placed in that position, and that is my continuing objection.

* * * xix p.129

Q. (By Mr. Williams): Mr., Dr. Downen, did you know that when an Extension Agent went and applied for Extension Leader in one of the West Tennessee counties, he was not even interviewed? Black Extension Agent?

MR. PARKER: Your Honor, again, what another person has in another county, did regarding their interview, I object. It has no relevance here.

HEARING EXAMINER: Alright, your objection is sustained.

Q. (By Mr. Williams): Alright, sir, I will ask you once more. Did you know that the Extension Agent, a white Exten-

sion Agent in Shelby was made acting Extension Leader over Mr. Braswell in 1982, with less time in service?

MR. PARKER: I object.

Q. Over the --

HEARING EXAMINER: Sustained.

Q. Over the black Agent rather, not over Mr. Braswell?

MR. PARKER: I object to the relevance of the question.

HEARING EXAMINER: I have ruled. Proceed.

xix p.144-45

Q. (By **Mr. Williams**) Alright, well, in any event, there were not any substantial number of white agents who were reassigned following school desegregation were there?

MR. PARKER: Your Honor, again, I am not going to sit here. I, at some point, I can't sit here, because this is not a class action suit, and this question doesn't relate to whether or not there has been any racial discrimination against Mr. Elliott as a person by the supervisor, that is supervising him now or the District Supervisor that is supervising him now or his Dean, and this question doesn't have anything to do with the charges in this case.

It may have something to do with the Senator's lawsuit, which he has brought, his class action against the Extension Service, but I have made continuing objections to this hearing being a place

for discovery in that lawsuit, and I am just marking my continuing objection. This question and all of the questions like it, don't have any thing to do with the charges in this case. It is improper for us to spend days going through all of this. We will never finish it.

MR. WILLIAMS: It has to do with the statement, Mr. Hearing examiner, it has to do with the statement in this Exhibit Forty-three, which my distinguished adversary has introduced.

MR. PARKER: It does not.

HEARING EXAMINER: Gentlemen, I am going to sustain this objection, and I believe this is the same thing as, the same context again and I would like for us to move on and we seem to be doing pretty good here relative to issues and let's try to move in that light if we can.

xxiii, p.30

* * *

HEARING EXAMINER: Let me ask you a question, Mr. Williams, and maybe you can help my memory, but have you not asked that question very specfically, that almost identical question before? If I haven't heard that question before, then I guess that, many times really, honestly I believe I can, there's nobody else going to read this transcript and make a recommendation but me. I am at a loss to know really what else I can draw from this as a Hearing Officer. Therefore, I am going to sustain this objection

xxiii, p.131

MR. PARKER: Your Honor, I am trying to let things proceed, but Mr. Colley [sic], whether he should be a judge is not on trial here. This, this letter speaks for itself as to what it say, but going into whether he should or should not be a judge, that is not the issue in regard to Mr. Elliot. Now I think it is wrong here in this public forum to be trying Mr. Colley [sic] as well as all these others in Madison County, whatever their records, whatever their background. They are just private citizens.

xxiii, p.129

MR. PARKER: I strongly object to that, Your Honor. That doesn't relate to this hearing. If he's got some allegation to make against Mr Shearon -- I'm tired of Mr. Shearon, Mr. Coley, Mr. Sanford Smith, all of these people who are citizens of this county being paraded through this hearing as though there is something wrong with them. If there are charges to be brought against them, there's the Attorney General of this county and there's the Agricultural Extension Dean who can be contacted apart from this hearing. I'm tired of these people's reputations being paraded through this hearing and I don't think that we should go any further with it. I object and I ask for a ruling on it.

MR. WILLIAMS: Mr. Hearing examiner, I'm not concerned about what distinguished adversary counsel is tired of and there's been just too much of what he's tired of and what he thinks is right. He should state an objection and state a reasonable ground of objection and he has stated none. The question in this case was designed to elicit whether or not the Dean

is aware of and has apprehended and/or has investigated racial attitudes on the part of Mr. Curtis Shearon as an individual who in reference to his charg s of inadequate job performance and othe alleged misconduct -- job misbehavior on the part of Mr. Elliott. Dr. Downen has said that he credits his testimony absolutely and has made a finding that he harbors no racial discrimination or racial attitudes toward Mr. Elliott and that the conflicting testimony given between him and Mr Elliott -- as to that testimony the Dean has selected Mr. Shearon's testimony to believe and not Mr. Elliott's despite racial circumstances. Now, I'm entitled on that score to ask him the question about whether he is aware of racial attitudes being expressed and expressed at the same time that he was making these determinations by Mr. Shearon in his office towards others. That's point one and the second point is, as to the white secretary and her refusal to perform work for Mr. Elliott, I'm certainly entitled ot ask him about that because that is racial discrimination against Mr. Elliott himself going on in an office where he says that Mr. Elliott is still an employee and is being attacked only and solely on account of his professional performance and onto on account of his race.

HEARING EXAMINER: Hold on a moment, Mr Parker. I said I wouldn't repeat this any more and I think I've said this a couple of times during the hearing, but I do not have the authority, as I perceive it, to try or to make rulings relating ot racial discrimination in this administrative hearing.

. . .

HEARING EXAMINER: Let's continue, gentlemen. I've sustained your objection and already made comments about the other forum for hearing this particular evidence related to the racial issue. Let's proceed.

xxiv, p.175-178

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HEARING EXAMINER: Objection sustained.

Q. **(By Mr. Williams)** What, if anything, did you observe with regard to gifts by Mr. Shearon to office personnel?

MR. PARKER: I object to that question. It's irrelevant to the --

MR. WILLIAMS: It's relevant on the issue of the attitude, the racial attitudes, of Mr. Shearon as bearing on the treatment of Mr. Elliott in this case.

MR. PARKER: It is not. It may relate to some claim of race discrimination that is a Title VII case pending in Federal Court, or the claim of race discrimination in the Equal Employment Opportunity Commission office in Memphis. it doesn't relate to these proceedings, and I'm going to object to it now and in the future.

HEARING EXAMINER: Objection sustained.

xxvii, p.15

* * *

MR. PARKER: What is said in this hearing about people who are before the hearing is proper, but it's not -- this hearing is not going into matters that is not before the hearing, and the officers of the court are not supposed to go into matters that are not before the hearing. We are supposed to stay on the matters; that's all we're supposed to do. We are here to find if the charge is to be sustained or not. This is not a Title VII race discrimination case. The kind of testimony [the treatment of other employees] that is asked to be elicited from this witness relates to that and would relate in that case and jurisdiction of that case in the United States District Court, the Western District of Tennessee, and we have filed responses in that case, and this hearing has no jurisdiction over those matters. This hearing is to determine whether or not the charges should be sustained or not. That's the reason that these matters are irrelevant. They should not be tried here. And also there is an EEOC complaint, and the EEOC will investigate this. For it to be brought out here and now is wrong. It's wrong because it's irrelevant and it's immaterial. This administrative proceedings doesn't have jurisdiction over those matters, and if I'm going to have to stand here and fight from now on about what the issues are, then maybe we are going to have to stop and get clarification from the Vice President as to what the issues are because -- unless we have your ruling

as to what the issues are -- because I am not here and I am not prepared, and I -- and it will take me some time to prepare cases that are going to be brought against all the agents in this county or in other counties or against the whole University or in a class action against the University. I did not now that this was the case I was coming to try. If it is, I demand that there be a recess for such time that I can have time to prepare for that.

MR. WILLIAMS: May I be heard just briefly further?

HEARING EXAMINER: Make it as brief as you can.

MR. WILLIAMS: He keeps bringing up the Federal Court case. The federal Court case has nothing ot do with it. We will undoubtedly be met at the threshold of that case by an argument which you will then make in Federal Court that they exhausted their administrative remedies down there, and that will determine the -- if this should be determined adversely to us. It's already been adjudicated by administrative quasi-judicial officer that Mr. Elliott was guilty of these violations, and therefore, there is nothing that needs to be decided in the Federal Court. Counsel has not addressed to the points I made earlier. The last statement that he made about coming here to try cases against other employees is not relevant because we are not trying cases against other employees. We are showing standards of conduct and standards of treatment that this young lady observed on the part of the agent of the University of Tennessee operating its Madison County office down here, and we are entitled to

show that that -- if that conduct involved anybody, it if involved the mayor of Jackson. We feel entitled to show it in this proceeding.

HEARING EXAMINER: Okay, gentlemen. I believe both of you have had your arguments sufficiently. I've allowed your arguments on both sides for one purpose specifically, and that is so that this can be in the record for counsel for both sides. I distinctly remember that this very issue was brought up in cross-examination of one or more other witnesses. There was an objection, and I believe there was a ruling by this Hearing officer, and I believe, if I remember correctly, it related specifically to this very incident in question.

Now, this is in the record, both arguments are in the record, and now the ruling again will be sustained. You may proceed. If I am wrong, then there will be a later review I'm sure, and that will be determined at that time whether or not I am right or wrong. For the time now, my ruling is again I will sustain this. Proceed. Now you will not allow any further lengthy -- you will have an opportunity to argue, but we are going to keep it more brief than that in the past. Let's proceed.

* * * **xxvii, p.25-30**

Q. **(By Mr. Williams)** Have you observed any evidence of racial discrimination in the office?

MR. PARKER: I object to that.

HEARING EXAMINER: Sustained.

Proceed with the questions relating to job performance and job behavior.

Objection sustained.

xxviii, p.210

* * *

MR. PARKER: Mr Hearing examiner, there, I don't want to believe, really that there are certain things, there is a lawsuit of a class action brought in the United States District Court for the Western District of Tennessee, Jackson Division, in which that class action allegation that the 4-H program for Mercer, Tennessee has been handled on racial lines. This is not the place for testimony to be brought in concerning that. Mr. Elliott's job assignment for the period in which he, for which he is, the charges have been made against him, have nothing to do with any primary assignment in 4-H or that he's been assigned to either small farms agents for the University of Tennessee. There's already been all kind of testimony about how, he came to become small farm agent, which occurred long before Mr. Shearon ever came to this county and those matters don't relate to the issues here. They may relate to that lawsuit that's pending in United States District Court, but again, I, I'm not prepared here to fight that class action. There's been no justification yet that that class action can ever be maintained and to start here having proof under oath here, where, where we have to counter that proof. Again, I, I submit is improper. It is, it is expanding the scope of this proceeding and

that's the reason I continue, I have a continuing objection to this line of question.

xxix, p.27

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HEARING EXAMINER: I am not getting any further into the issue which I know is going to come before a Federal Judge, who is competent and has the authority to listen to this, and I am sure, if I were in the same position, that I would want to proceed in this manner, if I felt that way, that your client feels, but I am not in a position to hear this any further, Mr. Williams. Please respect my position as Hearing examiner under the Administrative Procedure Act, and let's proceed with this hearing.

xxix, p.109

* * *

Q. (By **Mr. Williams**) Mr. Winston, I believe when we recessed you were talking about the disparities in salaries between white and black agents.

A. Well, there was an audit in the late 70's about this and I saw a report about this and the black agents --

MR. PARKER: Your Honor, before he goes further I'm going to object to his continuing to testify about this matter at this hearing. If he has a complaint, the place that he can file it is with the University or the proper authorities, and then they can look at it there. This is not the place to look at it and I object to going into this.

HEARING EXAMINER: This objection is sustained. That is not, in my opinion, the proper forum for this to be asked. Proceed with your next question, Mr. Williams.

xxxiii, p.3

* * *

Q. Did you have difficulty in winning any prizes for an integrated affair?

MR. PARKER: Your Honor, I object to that. Those issues - we recognize that this young man was outstanding in his 4-H activities and I object going into the background. This isn't the place. We have a lawsuit in which those issues are present.

HEARING EXAMINER: That is sustained. Proceed.

xxxiiii, p.133

* * *

Q. Can you identify Exhibits seventy-two and seventy-three?

A. Yes sir.

Q. Identify them please?

A. There are sign-out sheets that I had xeroxed to show that, well, it was said that I had signed out, rather loosely, and I wanted to show that this was the normal trend of signing out. Going to the grocery store or wherever and I wanted to show that everybody else, why

reprimand me for it when this was the common trend. And, after I found out that these, it was a secret about these that I could not get them, I started making my own copies early in the year.

Q. All right, sir.

A. One other thing I'd like to say about it, if I might, about that rating form. I noticed on the rating form, Miss Mary Blakemore, after this, this deal started here, after this hearing started, Miss Mary Blakemore has been receiving excellent ratings --

MR. PARKER: Your Honor, I object before --

A. But she has gone down to a four also.

MR. PARKER: I object and ask that that be stricken. Her ratings --

HEARING EXAMINER: Objection sustained. It's irrelevant.

MR. WILLIAMS: Well, I, --

MR. PARKER: You can go into that in the Federal Court case if it's a part of the pattern of practice, but it doesn't relate here.

MR. WILLIAMS: I would respectfully submit, Mr. Hearing Officer, that it is, it is incorrect to state that there is no issue of racial discrimination involved in this matter. Not only have we submitted an issue in that regard, but the issue is implicit in everything that has happened

in this case and, a pattern of racial discrimination because, against another black employee is certainly relevant.

HEARING EXAMINER: The objection is sustained. This can remain in the record for record purposes.

MR. WILLIAMS: All right.

Q. You have also, pick up Exhibit seventy-four. I believe you've also testified with regard to that one, the Ku Klux Klan document? Do you have anything to add in regard to that one?

A. No sir.

Q. All right, now, Mr. Elliott, pick up Exhibit seventy-five, please and, state whether or not you can identify that?

A. Yes sir, I can.

Q. What is it?

A. This is a complaint by me, that I put in the, the Civil Rights file and sent a copy to Dr. Ferrell. This was written on January 23, 1981 --

Q. Now, was it actually '81?

A. 1982, no it was '80 --

Q. It say it was --

A. This was written in '81, but it was about the year of 1980.

Q. Well, read it Mr., look at the second paragraph Mr., where was the mistake made, the second paragraph or at

the top of it? You couldn't write something in January of 1981 that related to events occurring in October 1981 --

HEARING EXAMINER: Objection sustained.

xliv, p.35-38

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HEARING EXAMINER: Very well. Proceed.

Q. **(By Mr. Williams)** All right now, Mr., Mr. Elliott, what about the, the agriculture, Madison County Agriculture Committees across the state. What is their racial composition?

MR. PARKER: What, what, I, I --

A. Madison County is --

MR. PARKER: Wait a minute --

HEARING EXAMINER: Mr. Elliott, what's, let's clarify that question?

MR. WILLIAMS: What is the racial composition of the Agricultural, Madison, of the, UT Extension Service Agricultural Committee across the state?

MR. PARKER: Your Honor, I object to that question. It doesn't have anything to do with this, with, with, this hearing, plus they are not UT Agricultural Committees across the state. They are county agricultural committees and that doesn't have anything to do with the University of Tennessee as far as appointing those committees. Those committees are appointed by county governments. Just as the one here is.

MR. WILLIAMS: They are utilized --

MR. PARKER: I object. It's irrelevant, it's incompetent, it's immaterial to, to these charges.

MR. WILLIAMS: They're organized and utilized by the University of Tennessee Agricultural Extension Service.

MR. PARKER: Your Honor, they're organized and utilized pursuant to legislation passed by the General Assembly --

HEARING EXAMINER: Well --

MR. PARKER: Of the State of Tennessee.

HEARING EXAMINER: Genlemen, these committees, you could have a different, situation in East Tennessee, Middle Tennessee, West Tennessee. I don't see what relevance the composition of an agriculture committee, for example, in a county in, Shelby County or Sullivan County, or wherever, would really have on this. I'm going to sustain that objection, Mr. Williams.

xlv, pp.33,34